Supreme Court, U.S.
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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LYDIA SANTIAGO, as personal representative of the Estate of Jaime Santiago,
Petitioner,

v.

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL, and DENNIS DANNER,
Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

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PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Does a state prison inmate have a liberty interest under the 14th Amendment to the Constitution to continued participation in a community residential confinement program when State regulations explicitly provide that removal from the program for disciplinary reasons requires a due process hearing?

2. Does the "random and unauthorized" doctrine under 42 U.S.C. § 1983 protect a State official from liability for finding an inmate guilty of misconduct without any evidence of guilt, when the State has vested the official with authority to deprive an inmate of liberty by finding the inmate guilty by a preponderance of the evidence?

3. For proceedings occurring prior to the effective date of the Prison Litigation Reform Act of 1995, did an inmate waive procedural due process claims under 42 U.S.C. § 1983, by failing to raise those claims in an internal prison administrative appeal?

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On Petition For Writ Of Certiorari
To The Court Of Appeals
Of The State Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

Lydia Santiago, personal representative of the estate of Jaime Santiago, respectfully petitions for a writ of certiorari to review the decision of the Court of Appeals of the State of Wisconsin in this case.

OPINIONS BELOW

The order of the Wisconsin Supreme Court denying the petitioner's petition for review of the decision of the Wisconsin Court of Appeals is unreported, and is included at page 53a in the Appendix to this Petition.

The opinion of the Wisconsin Court of Appeals is reported at 205 Wis. 2d 292 and 556 N.W.2d 356, and is included at page 1a in the Appendix to this Petition.

The September 26, 1994 Findings of Fact and Conclusions of Law of the Circuit Court of Dane County, Wisconsin, is unreported; it is included at page 57a in the Appendix to this Petition.

Four memoranda decisions by the Circuit Court of Dane County, Wisconsin, which were adopted by reference in the circuit court's September 26, 1994 Findings of Fact and Conclusions of Law, are unreported; they are included at pages 73a, 96a, 110a, and 133a in the Appendix to this Petition.

JURISDICTION

The Wisconsin Court of Appeals entered its decision sought to be reviewed on September 30, 1996. Appendix ("App."), p. 1a. The Wisconsin Supreme Court denied the petitioner's request for discretionary review of the Court of Appeals decision on November 20, 1996. App., p. 53a. This Court has jurisdiction to review the decision of the Wisconsin Court of Appeals under 28 U.S.C. § 1257.

CONSTITUTIONAL, STATUTORY, AND ADMINISTRATIVE PROVISIONS INVOLVED

The Constitutional provision involved in this case is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The statutory provision involved in this case is 42 U.S.C. § 1983, which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The state statutes and administrative regulations involved in this case are lengthy and are included in the Appendix. They include Wis. Stat. § 301.046 (1993-94); Wis. Admin. Code DOC § 303.63 (1994); Wis. Admin. Code, Subch. X - Disciplinary Procedure and Penalties, DOC §§ 303.64-303.87 (1994); and Wis. Admin. Code, Ch. DOC 327 - Community Residential Confinement (1994). The principal regulations are the following:

> DOC 327.10 Termination of CRC Placement. An inmate's CRC placement may be terminated for any of the following reasons:

(1) At the inmate's request, ...;
(2) If there is a change of circumstances including a medical condition or the loss of a job, school or treatment program; or
(3) If the department determines that the inmate has committed one or more of the following:

...

(b) Violation of the rules of any facility in which the inmate is held or to which the inmate is assigned;
(c) Violation of the administrative rules of the department with the modifications described in s. DOC 327.09;

. . . .

DOC 327.11 Termination procedure.

. . . .

(3) If the placement is terminated under s. DOC 327.10(3), the inmate shall be afforded a hearing under s. DOC 327.13 for the purpose of determining whether the alleged violation occurred.

DOC 327.12 Discipline

. . . .

DOC 327.13 Disciplinary procedure and penalties. The due process fact finding hearing to determine if the inmate has committed a violation under s. DOC 327.12 shall be conducted in accordance with the procedures under ss. DOC 303.64 to 303.87, modified as follows:

. . . .

STATEMENT OF THE CASE

With this case, the Court should clarify the role of the states in establishing liberty interests protected by the due process clause of the 14th Amendment to the Constitution. In *Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293 (1995), the Court held that "negative implication[s] from mandatory language in prisoner regulations" do not establish state-created liberty interests. The Court should now decide whether states can create liberty interests with explicit, positive language mandating that inmates may be deprived of liberty only if due process procedures are followed.

Whether this is the appropriate case to define the state's role in creating liberty interests, however, may depend on the Court's decision in a pending case. On December 9, 1996, the Court heard oral argument in *Young v. Harper*, Case No. 95-1598, a case raising the question of whether a state community-based preparole program involves a liberty interest arising directly from the due process clause itself. If the Court concludes that it does, then its holding will likely cover the community residential confinement program at issue in this case. If it does not, however, then this case will be a good vehicle to further develop the principles of *Sandin*.

Statement of Facts

Jaime Santiago was an inmate in the custody and under the supervision of the Wisconsin Department of Corrections from about 1980 until his death on November 20, 1995. In 1987 he was diagnosed with progressive amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease. As a result of his ALS, Santiago was extremely weak and had little or no use of

most of his muscles. By June, 1992, he could not stand without assistance, he could not use his hands, and he had to be fed, bathed, and totally cared for by others. By July, 1992, his speech was badly impaired, making it difficult for most people to understand him.

In January 1992, Santiago was re-classified as minimum security/Community Residential Confinement (CRC) status. CRC is the lowest security status in the Wisconsin adult prison system and, through CRC, inmates are placed in community settings. Most CRC placements are in private residences, but CRC inmates may be placed in other community settings, including nursing homes. Santiago's CRC placement was in the Plymouth Manor Nursing Home in Milwaukee, Wisconsin, where he received treatment for his ALS and was largely free from the restraints of prison life.

In June 1992, Santiago was involved in an incident with a cook at the nursing home. His CRC agent - a state probation and parole agent - investigated the incident and filed a conduct report under the prison system's disciplinary procedures charging Santiago with threats, disruptive conduct, and violating institution policies and procedures. The conduct report did not identify the policies or procedures he was alleged to have violated.

As a result of the incident, Santiago was removed from the nursing home and taken to Waupun Correctional Institution. Because he was charged with "major" offenses, under Wisconsin's prison regulations he was entitled to a due process hearing, which includes the rights to notice, to an advocate, and to present and question witnesses. Wis. Admin. Code, DOC §§ 327.12, 327.13, and 303.76 (1994). While he could have

waived his due process rights, Wis. Admin. Code, DOC § 303.76, he did not do so. Nevertheless, defendant Todd Zangl, the hearing examiner, failed to give Santiago a due process hearing. Santiago was not given notice of the hearing, he was not assigned an advocate, and he did not have the opportunity to develop a defense or present witnesses. There were no witnesses at the hearing. With the assistance of a nurse who "interpreted" for him, however, he gave a statement in response to the allegations. Zangl found Santiago guilty of disruptive conduct and violating institution policies and procedures (without, however, identifying any policies or procedures which were violated). Santiago filed an administrative appeal. Defendant Danner, the appeal officer, affirmed both the waiver hearing and Zangl's decisions.

As a result of the determinations of guilt made by Zangl, Santiago's mandatory release date was extended and he lost his placement in the CRC program. Explicit state regulations guarantee an inmate the right to a due process hearing before CRC status is terminated due to an alleged disciplinary violation. Under DOC 327.11(3) "[i]f the placement is terminated under s. 327.10(3), the inmate shall be afforded a hearing under s. DOC 327.13 for the purpose of determining whether the alleged violation occurred." Santiago's CRC termination was under DOC 327.10(3) for violation of administrative and institution rules. DOC 327.13 mandates that a "due process fact finding hearing" be conducted to determine if the inmate has committed a violation.

With his removal from the CRC program, Santiago was placed in the Health Services Unit of Waupun Correctional Institution, a unit that the trial court found on personal observation to be "Dickensian in its vintage and bleakness."

App., p. 67a. He remained there for about one year - until June 30, 1993 - when he was again placed in the CRC program. Eventually, he was again removed from the CRC program and returned to Waupun. Eight days before his death, he was placed in the community at the home of his sister - the petitioner in this case.

Procedural Background

On September 28, 1992, Santiago filed this lawsuit *pro se* (with the assistance of another inmate) and on March 5, 1993, he filed a supplemental summons and complaint. His complaint and supplemental complaint specifically alleged violation of his rights under 42 U.S.C. § 1983, as well as state law claims. The defendants were state employees acting under color of state law. On January 11, 1993, Santiago filed a motion for summary judgment, which the court granted in part on August 9, 1993. App., p. 73a. In its decision, the circuit court concluded that Zangl violated Santiago's procedural and substantive due process rights by denying him an advocate, denying him a full due process hearing, and finding him guilty without some reliable evidence of his guilt. The court also denied Zangl's request for qualified immunity. In May, 1994, at the request of the circuit court, counsel of record on this petition appeared on behalf of Santiago.

Defendants Zangl and Danner filed motions for reconsideration on August 19, 1993, June 8, 1994 and June 29, 1994. The court denied each of these motions. App., pp. 96a and 110a. On August 15, 1994, the parties submitted simultaneous briefs on Danner's entitlement to qualified immunity (and immunity under state law for the state law claim)

and discretionary immunity. The court denied Danner's motion for qualified immunity of the federal claims. App., p. 133a.

This case was tried to the court on September 20, 21, and 22, 1994. On September 26, 1994, the court issued its Findings of Fact and Conclusions of Law, App., p. 57a, which incorporated by reference all of the court's previous decisions in this case. The court found that defendants Zangl and Danner violated Santiago's federal rights and that all three defendants violated his state rights. The court entered judgment in Santiago's favor on November 21, 1994. App., p. 54a.

The defendants appealed to the Wisconsin court of appeals from the trial court's judgment. On May 31, 1996, the court of appeals requested supplemental briefing on how *Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293 (1995) which was decided after the case had been fully briefed, affected this case. On September 30, 1996, the court of appeals issued its decision reversing the trial court and directing that Santiago's complaint be dismissed. App., p. 1a. The Wisconsin Supreme Court denied Santiago's petition to review the court of appeals decision on November 20, 1996. App., p. 53a.

The Trial Court Decision

After a three day trial, the trial court held that defendants Zangl and Danner violated Santiago's due process rights. In support of that holding, the court issued detailed findings of fact and conclusions of law. The court found, for example, that Santiago did not waive his right to a major hearing or to the assistance of an advocate and that he "affirmatively asserted" those rights. The court further found that neither the conduct

report, which contained only hearsay, nor Santiago's statement, supported a finding of guilt.

Based upon those and other findings, the court held that Zangl and Danner violated Santiago's due process rights by failure to provide him with a full due process hearing when Santiago had not waived his right to a due process hearing, by finding Santiago guilty of disruptive behavior based on non-attributed evidence and by drawing improper inferences from Santiago's statement, by failing to list in his written decision what portions of Santiago's statement supported his determination, and by failing to identify institution policies and procedures that Santiago allegedly violated.

The court entered judgment in favor of Santiago and against defendants Zangl, Danner, and Ware. The court awarded Santiago compensatory damages in the amount of $10,000 jointly against defendants Zangl, Danner, and Ware, and an additional $500 against Zangl. The court also granted Santiago declaratory relief and awarded him his costs and attorneys fees.

The Wisconsin Court of Appeals Decision

The court of appeals reversed the trial court's decision and remanded the case for dismissal. The court found that while Santiago had a liberty interest in not having his mandatory release date extended, under *Sandin v. Conner* he did not have a liberty interest in retaining his CRC status. In so holding, the court reasoned that DOC § 327.11(3), which requires that an inmate receive a "due process hearing" before his CRC status is terminated, does not create a liberty interest. The court then distinguished CRC from probation and parole and held that the

Due Process Clause itself did not vest in Santiago a liberty interest in retaining his CRC status.

Though the court acknowledged that Santiago was not required to exhaust his administrative remedies, it found that when he filed an administrative appeal without raising all of the due process violations that occurred during the disciplinary hearing, he waived the right to later raise those issues in a § 1983 action. The court found that the only issue raised in his administrative appeal was an objection to finding him guilty without "some evidence" of his guilt and that he waived all other due process violations.

Regarding the "some evidence" issue, the court agreed with the trial court that there was not even "some evidence" to find Santiago guilty of violating institution policies and procedures. However, the court found that Santiago's statement was evidence that he engaged in disruptive conduct.

After concluding that the defendants violated Santiago's constitutional rights by finding him guilty of violating institution policies and procedures without some evidence of his guilt, the court of appeals then concluded that the defendants' conduct was "random and unauthorized" and that they were not liable for the underlying constitutional violation. In so holding, the court first held - contrary to the trial court's holding - that whether there is "some evidence" in the record is an issue of procedural - not substantive - due process. The court then concluded that the defendants' failure to base their decision on some evidence was "random and unauthorized" because a prison regulation required that findings of guilt be based on a preponderance of the evidence. The court further found that adequate state remedies

existed to redress the due process violation that Santiago suffered -- extension of his mandatory release date.

Finally, the court held that all three of the defendants were entitled to discretionary immunity from Santiago's state law claims.

REASONS FOR GRANTING THE WRIT

I. THE COURT'S DECISION IN YOUNG V. HARPER MAY DETERMINE WHETHER SANTIAGO HAD A PROTECTED LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE ITSELF.

On December 9, 1996, the Court heard oral argument in *Young v. Harper*, Case No. 95-1598. The issue in *Young* is whether continued participation in an Oklahoma pre-parole conditional supervision program is protected as a liberty interest by the due process clause of the Fourteenth Amendment to the U.S. Constitution because it is more like parole than minimum supervision imprisonment. The Wisconsin community residential confinement program is similar to the Oklahoma conditional supervision program. If Harper had a liberty interest in the conditional supervision program under the due process clause itself, then Santiago probably did also. Depending on the specific holding in *Young*, the Court could either summarily reverse the Wisconsin court of appeals decision that Santiago did not have a liberty interest in the CRC program, or it could remand the case for additional consideration in light of *Young*.

II. IF HARPER - AND SANTIAGO - DID NOT HAVE A LIBERTY INTEREST DIRECTLY UNDER THE DUE PROCESS CLAUSE, THEN THE COURT SHOULD REVIEW THIS CASE TO DEVELOP THE LAW ON A STATE'S ROLE IN CREATING PROTECTED LIBERTY INTERESTS.

Wisconsin law requires that the removal of an inmate from the CRC program for disciplinary reasons requires a "due process hearing" (or waiver of a due process hearing). Nevertheless, the Wisconsin court of appeals concluded that the explicit state requirement for a due process hearing does not create a liberty interest which would constitutionally require a due process hearing. The court's remarkable conclusion that a state requirement for a due process hearing does not mean that a due process hearing is really required was based on this Court's decision in *Sandin v. Conner*, __U.S. __, 115 S.Ct. 2293 (1995):

> Nor, as Santiago argues, is a liberty interest created by the requirement in Wis. Adm. Code § DOC 327.11(3) that an inmate have a "due process hearing" before his CRC status is terminated. This is the type of "search for a negative implication from mandatory language which courts need no longer make. *Kirsch v. Endicott*, 201 Wis. 2d 702, 712, 549 N.W.2d 761, 765 (Ct. App. 1996) (citing *Sandin*, __U.S. at __, 115 S. Ct. at 2300).

App., p. 17a. The *Sandin* Court's conclusion, however, that courts do not have to search for negative implications to determine whether due process is required has no application to a state's positive mandate requiring due process. The Wisconsin

court of appeals' contrary conclusion conflicts with relevant decisions of this Court - such as *Sandin* and *Wolff v. McDonnell*, 418 U.S. 539 (1974). Moreover the court of appeals decided an important question of federal law - the ability of a state to create liberty interests - that should be settled by this Court. Under Supreme Court Rule 10(c), accordingly, this case is appropriate for review.

A. *Sandin v. Conner* Reaffirmed The States' Role In The Creation Of Protected Liberty Interests.

In *Sandin v. Conner*, a clear majority of this Court, including two dissenters, reaffirmed the central role that states play in the creation of liberty interests that are protected by the Due Process Clause. *Sandin*, 115 S. Ct. at 2300.[1] The Wisconsin court of appeals ignored this mandate, finding that regulations affirmatively stating that an inmate has a right to a "due process hearing" do **not** create a constitutionally protected right to such a hearing. By disregarding clear regulatory language that affirmatively vests in inmates a right to a due process hearing, the court's decision threatens the State's ability to create due process rights and represents a fundamental misunderstanding of *Sandin*.

The *Sandin* Court altered the analysis that applies to the determination of whether the state has created a liberty interest.

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[1] In dissent, Justice Ginsburg joined by Justice Stevens, concluded that the inmate had a liberty interest inherent in the Due Process Clause itself in avoiding disciplinary segregation. *Sandin*, 115 S. Ct. at 2302. In reaching this conclusion, these Justices appeared to question the principle that states may create rights protected by the Due Process Clause *Id.* at 2303.

The Court abandoned the "mandatory language" approach that was developed in *Hewitt v. Helms*, 459 U.S. 460 (1983), under which courts looked to mandatory language in regulations to determine whether the state created a liberty interest. *Sandin*, 115 S. Ct. at 2300. Instead, the Court held, courts must look to the nature of the deprivation at issue and to whether the state intended to vest in the individual a right of "real substance." *Id.* at 2298.

Sandin involved an inmate who was serving a sentence of 30 years to life in a maximum security prison. The inmate claimed that he was deprived of due process when, after an adjustment committee refused to allow him to present witnesses at his disciplinary hearing, he was found guilty and sentenced to 30 days in disciplinary segregation. *Id.* at 2296.

In analyzing the inmate's procedural due process claim, the Court criticized *Hewitt*'s "mandatory language" approach as a "mechanical dichotomy" that shifted the focus from the nature of the deprivation to the specific language of the regulation at issue. *Id.* at 2298-99. The Court also disapproved of the *Hewitt* approach because it forced courts to draw negative inferences from mandatory language in regulations and find protected interests in regulations that were designed to guide corrections officials and not to confer rights on inmates. *Id.*

In abandoning *Hewitt*, the Court reaffirmed the vitality of the due process principles that were "correctly established and applied" in *Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Meachum v. Fano*, 427 U.S. 215 (1976). *Id.* at 2300. In so holding, the Court made clear that states may create liberty interests that are protected by the Due Process Clause. *Id.* In determining whether such an interest has been created, courts

must examine the nature of the deprivation at issue and determine whether the state has created a right of real substance, like the good-time credit scheme at issue in *Wolff*.[2] *Id.* at 2298. When the deprivation affects the duration of an inmate's imprisonment or causes a major disruption in his environment, the deprivation imposes an atypical and significant hardship on the inmate and due process attaches. *See id.* at 2301-2302.

Applying these principles, the *Sandin* Court cited three reasons for finding that the inmate in that case did not have a liberty interest in being free from disciplinary segregation. First, the inmate's life in segregation "mirrored" conditions imposed on inmates in administrative segregation and protective custody. *Id.* at 2301. Second, because the prison generally imposed significant amounts of lock-down time on inmates in the general population, 30 days in disciplinary segregation "did not work a major disruption in his environment." *Id.* Third, the inmate's punishment did not inevitably affect the duration of his sentence. *Id.* at 2302.

B. State Regulations Mandating A Due Process Hearing Prior To Deprivation Of Specific Benefits Create A Protected Liberty Interest.

In holding that Santiago did not have a liberty interest in the retention of his CRC status, the court of appeals improperly construed *Sandin* and disregarded clear and affirmative language in state regulations that guarantee an inmate a due process hearing. In so holding, the court's decision questions the state's

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[2] In *Wolff v. McDonnell*, the Court found that while the constitution itself did not create a liberty interest in the retention of good-time credits, the State had created such an interest.

ability to create protected liberty interests and fundamentally conflicts with *Sandin*.

State regulations clearly and unambiguously guarantee an inmate the right to a due process hearing before his CRC status is terminated. "[I]f the placement is terminated under s. DOC 327.10(3), the inmate shall be afforded a hearing under s. DOC 327.13 for the purpose of determining whether the alleged violation occurred." DOC 327.11(3) (emphasis added). Under DOC 327.13 a "due process fact finding hearing" shall be conducted to determine if the inmate has committed a violation. (emphasis added). After affirmatively requiring that the state provide a "due process" hearing, it defies logic to say that the state has not vested in the inmate a due process right. Language could hardly be clearer than that of these rules, which specifically and affirmatively guarantee an inmate a "due process hearing." If these regulations do not create a right to a due process hearing, it is difficult to conceive of any regulations that would.

The plain wording of the regulation makes clear that the reasoning underlying the holding of the court of appeals is wrong. The court reasoned that to find a liberty interest in this case "is the type of 'search for negative implication from mandatory language'" that *Sandin* precludes. App., p. 17a. However, no "negative implication" is needed to find that DOC 327 vests in inmates a protected right. The regulations are unambiguous and stated in affirmative terms -- a due process hearing must be provided before terminating an inmate's CRC status based on a rule violation. *Sandin* did not preclude states from vesting in inmates a protected liberty interest. To the contrary, in reaffirming *Wolff*, the court found that state law is a source of due process rights. *See Sandin*, 115 S. Ct. at 2297,

2300. Nor did *Sandin* direct courts to disregard affirmative language in state regulations that explicitly guarantee an inmate due process. Both conclusions, inherent in the court of appeals' decision, threaten the state's ability to determine the rights it will vest in its citizens.

C. The Loss Of A Community Placement In A Nursing Home And Transfer To A Prison Is An "Atypical And Significant Deprivation."

The court of appeals also misapplied *Sandin*'s "atypical and significant deprivation" standard. The court of appeals held that "[h]is transfer to WCI subjected him to conditions no different from those ordinarily experienced by large numbers of inmates." App., pp. 15a-16a. This reasoning, however, is at odds with *Sandin*, under which a deprivation is "atypical and significant" if it "work[s] a major disruption in [the inmate's] environment." *Sandin*, 115 S. Ct. at 2301. *See also Roucchio v. Coughlin*, 923 F. Supp. 360, 375 (E.D.N.Y. 1996) (inmate had liberty interest in work release program because revocation of his conditional freedom worked a major disruption in his environment).

Few deprivations could be more disruptive than the deprivation that Santiago suffered when he was removed from the nursing home and transferred to Waupun prison. At the nursing home, Santiago was part of the nursing home community and lived like other patients. He received medical care and physical therapy and, even though he was required to wear an electronic monitoring device, he was largely free from the restraints of prison life. The loss of this freedom and the nursing care he needed worked a major disruption in his life.

The court of appeals' decision reflects a fundamental misunderstanding of *Sandin*. *Sandin* did not find irrelevant the impact that a particular loss has on an inmate. Nor did it require an inmate to show that no other inmate lives under the conditions to which he has been subjected.

III. THE "RANDOM AND UNAUTHORIZED" DOCTRINE DOES NOT APPLY WHEN OFFICIALS ARE VESTED WITH DISCRETION TO EFFECT A CONSTITUTIONAL DEPRIVATION.

After concluding that Zangl and Danner violated Santiago's rights by finding him guilty of violating institution policies and procedures without any evidence of his guilt, the court of appeals found that neither is liable because their conduct was "random and unauthorized." The court held that the defendants' finding Santiago guilty without any evidence was "random and unauthorized" because an administrative rule required that inmates be found guilty by a preponderance of the evidence. App., p. 35a.

By broadly applying the "random and unauthorized" doctrine in this context, the court of appeals' decision essentially immunizes state officials from liability under sec. 1983 as long as a rule or regulation generally addresses the conduct at issue. This result is contrary to the teachings of *Zinermon v. Burch*, 494 U.S. 113 (1990). The result also creates an anomaly that only this Court can resolve. On the one hand, violations by state officials of specific state rules that greatly circumscribe their discretion are random and unauthorized; on the other hand, in the view of the Wisconsin court of appeals the violation by a state officer of a broad rule - such as making findings under a

preponderance of the evidence standard - also is immunized under the random and unauthorized doctrine.

Since the "random and unauthorized" doctrine only applies to violations of procedural due process, a threshold issue is whether the "some evidence" standard of *Superintendent Massachusetts Correctional Institution v. Hill*, 472 U.S. 445 (1985), which protects inmates against arbitrary deprivations, is procedural or substantive or both. Substantive due process protects individuals against arbitrary government action, regardless of the fairness of the procedures used. *Zinermon*, 494 U.S. at 125. There is nothing more arbitrary than finding an individual guilty of a disciplinary violation without "some evidence" of his guilt. *See, e.g. Culbert v. Young*, 834 F.2d 624, 630 (7th Cir. 1987) (inmates have a substantive due process right not to be found guilty except by an appropriate quantum of evidence.); *Aikens v. Lash*, 514 F.2d 55, 60 (7th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976) (the procedural due process rights provided in *Wolff* "should not easily be emasculated by allowing prison officials to infringe arbitrarily on an inmate's substantive due process right not to be found guilty except by an appropriate quantum of evidence."). *See also Chavis v. Rowe*, 643 F.2d 1281, 1287 (7th Cir. 1981). While referring to the "some evidence" requirement as procedural in *Superintendent v. Hill*, 472 U.S. at 454, this Court has not specifically ruled on whether the standard is a substantive protection.

Even if the "some evidence" standard is procedural, the random and unauthorized doctrine does not apply here. The doctrine was developed in *Parratt v. Taylor*, 451 U.S. 527 (1981) *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986). In *Parratt*, a prison official

negligently lost an inmate's mail-order hobby kit and the inmate sued under 42 U.S.C. § 1983. The Court dismissed the complaint, reasoning that because the State could not predict the loss, it would have been impossible to provide a meaningful predeprivation hearing. *Id.* at 541. Because the state was unable to provide a predeprivation hearing, the Court found, the state could remedy the random and unauthorized deprivation by providing meaningful post-deprivation remedies to redress the injury. *Id.* at 542. In that case, postdeprivation remedies were adequate because the inmate received full compensation for the property he lost. *Id.* at 544. *See also Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (prison guard's intentional destruction of an inmate's property was "random and unauthorized" and did not give rise to a claim under sec. 1983).

In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Court applied the random and unauthorized doctrine to deprivations of liberty. *Zinermon* involved a plaintiff who claimed that he was deprived of liberty when the defendants allowed him to be voluntarily admitted for psychiatric care when they knew, or should have known, that he was not competent to consent to treatment. *Id.* at 124-25. The *Zinermon* Court held that the defendants' actions were not random and unauthorized. *Id.* at 138-39. In so holding, the Court reasoned that when a deprivation is predictable and predeprivation remedies are possible and not unduly burdensome, predeprivation remedies must be provided. *Id.*

Unlike the deprivations at issue in *Parratt* and *Hudson*, the Court found that the deprivation at issue in *Zinermon* was foreseeable in that it would occur at a particular point in the admission process -- when the patient is given admission forms to sign. Given the predictable nature of the deprivation, the

Court found that the deprivation was not "random." *See id.* at 136-37.

The Court also found that the defendants' conduct was not "unauthorized." In so holding, the court rejected the State's argument that it could not "prevent its officials from making random and unauthorized errors in the admission process." *Id.* at 135. The Court held that when the State chooses to vest officials with discretion to effect a deprivation of liberty, the State also has a duty to insure that no deprivation occurs without due process. *Id.* at 135-36, 138. It is "immaterial," the Court said, whether the deprivation arises from the "failure to comply with state procedures" or from the absence of required procedures. *Id.*

Application of the random and unauthorized doctrine in cases where state officials' discretion is greatly limited is consistent with this Court's analysis in *Zinermon.* In *Irby v. Macht*, 184 Wis. 2d 831, 522 N.W.2d 9 (1994), for example, the Wisconsin Supreme Court held that actions in violation of regulations which "severely limit the discretionary authority of prison officials" were random and unauthorized. Unlike the regulations at issue in *Irby*, the broadly worded regulation that required the defendants in this case to base their decisions on "a preponderance of the evidence" does not "severely limit the discretionary authority of prison officials."[3]

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[3] The trial court in this case concluded that the failure to provide Santiago with a due process hearing by erroneously believing that he had waived due process violated his right to procedural due process. Consistent with *Zinermon*, the court held that the defendants' actions were not random and unauthorized. While there could have been a rule requiring the defendants to verify that an inmate had waived his due process rights before conducting a waiver hearing, there was no

The court of appeals also adopted an argument that the *Zinermon* Court specifically rejected -- that the State could not predict or prevent its officials from making random and unauthorized errors in the disciplinary process. *See Zinermon*, 494 U.S. at 135. As the Supreme Court made clear, it is immaterial whether the due process violation resulted from the failure to comply with established procedures or the absence of such procedures. In either case, the state has a duty to ensure that no deprivation occurs without due process. *Id.* at 138. To rule otherwise would allow the only people who are in a position to provide due process with immunity from suit when they fail to provide required protections. This result is at odds with sec. 1983 which was enacted to enable to individuals to redress constitutional violations.

Moreover, the due process violations that occurred here were not "random and unauthorized" within the meaning of *Zinermon*. Like *Zinermon*, the due process violations - the denial of a due process hearing and an unsupported finding of guilt - were predictable in the sense that they would occur at a specific time - at the time the hearing was held and decision rendered. Accordingly, the deprivation was not "random." *See Zinermon*, 494 U.S. at 136.

Similarly, the defendants' conduct was not "unauthorized." Like the defendants in *Zinermon* the defendants here had broad authority to deprive an inmate of his liberty and cannot escape liability under sec. 1983 when they fail to provide

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such rule in Wisconsin. The court of appeals did not address the issue of whether the random and unauthorized doctrine applied to this issue because of its holding that Santiago waived the issue.

the procedural safeguards required before that deprivation occurs. *See id.* at 138.

Finally, as the trial court properly found, there is no adequate state remedy for the significant loss that Santiago suffered during the hundreds of days that he was deprived of nursing home care. The court of appeals did not reach that issue because it held that the termination from the CRC program did not implicate a liberty interest.

IV. THE COURT OF APPEALS CREATED A BROAD NEW "WAIVER" DOCTRINE THAT IS UNSUPPORTED BY ANY LEGAL AUTHORITY.

Relying on a Wisconsin Supreme Court case, *Saenz v. Murphy*, 162 Wis. 2d 54, 469 N.W.2d 611 (1991), the Wisconsin court of appeals created a broad new doctrine of "waiver" that is not founded on any legal authority. The court of appeals ruled that Santiago waived all of the procedural due process defects in his disciplinary hearing, except for his claim that there was no evidence of his guilt, by failing to specifically raise those issues in his administrative appeal. To support this decision, the court relied on *Saenz v. Murphy* and said that the fact that Santiago was not required to exhaust his administrative remedies was irrelevant to the waiver issue.[4]

Saenz v. Murphy involved an inmate's claim that his due process rights were violated when his witness was not present at his disciplinary hearing. *Saenz*, 162 Wis. 2d at 57. When his

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[4] The Prison Litigation Reform Act of 1995 requires prisoners to exhaust administrative remedies before bringing actions under 42 U.S.C. § 1983; 42 U.S.C. § 1997e(a).

witnesses were not present, the inmate walked out of the hearing room without objecting to the lack of witnesses. *Id.* In granting the defendant's motion for summary judgment, the court held that by walking out of the hearing without objecting to the witness's absence, the inmate waived any objections he may have had to the absence of his witness. *Id.* at 64.[5]

In applying the waiver principle to section 1983 actions, the *Saenz* court found that "the principle of waiver is supported by the same reasons which have motivated courts to require inmates to exhaust their administrative remedies before they may commence a sec. 1983 action." *Id.* at 66. The court reasoned that since an inmate "can be required to exhaust his administrative remedies before bringing a sec. 1983 action, he can be required to object to an alleged violation of his due process rights before the adjustment committee." *Id.*

Since *Saenz* was decided, this Court has held that states may not impose exhaustion requirements on section 1983 claimants. *Felder v. Casey*, 487 U.S. 131 (1988). The Wisconsin Supreme Court has "disavow[ed] any intimation in *Saenz v. Murphy* that prison inmates must exhaust their administrative remedies before they may commence a sec. 1983

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[5] Unlike *Saenz*, who left the hearing and refused to participate, Santiago fully participated in the process. He attended the hearing even though he was not given notice or an advocate, and he told the hearing examiner that he wanted his due process rights. He continued to participate in the process -- though he was not required to do so -- by filing an administrative appeal. After participating in the process to the best of his abilities, Santiago cannot reasonably be compared to the inmate in *Saenz* and cannot be deemed to have waived his due process rights because he failed to preserve his objections by using magic words.

action." *Casteel v. Vaade*, 167 Wis. 2d 1, 21 n.18, 481 N.W.2d 476 (1992) (citations omitted).

The court of appeals incorrectly created a broad new doctrine of waiver that is inconsistent with *Felder v. Casey*. Under *Felder*, an inmate is not required to file an appeal within the prison system. Since Santiago was not required to exhaust his administrative remedies, he cannot be deemed to have waived his rights by filing an administrative appeal. Application of the waiver doctrine under these circumstances would discourage inmates from attempting to resolve their claims outside of court.

CONCLUSION

This Court should grant the petition for a writ of certiorari or, in the alternative, summarily reverse the decision of the Wisconsin court of appeals and direct that it decide the appeal consistently with this Court's decision in *Felder v. Casey* and with this Court's pending decision in *Young v. Harper*.

Respectfully submitted,

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April 15, 1997

APPENDIX

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COURT OF APPEALS
DECISION
DATED AND RELEASED NOTICE

September 30, 1996

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

LYDIA SANTIAGO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAIME SANTIAGO,

Plaintiff-Respondent,

v.

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANBL AND DENNIS DANNER,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Dane County: MORIA KRUEGER, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., and Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

GARTZKE, Reserve Judge. Kathleen Ware, Todd Zangl and Dennis Danner appeal from a judgment awarding

damages to Jaime Santiago, an inmate at Waupun Correctional Institution (WCI). The defendants are state prison employees whose duties include the disciplining of inmates. The underlying action is for damages under 42 U.S.C. § 1983 and damages under state law for negligence.

The § 1983 issues are whether: (1) Santiago had a liberty interest in not having his mandatory release date extended and in remaining in a community residential confinement program; (2) Santiago waived procedural due process objections by not raising them at his disciplinary hearing and on administrative appeal; (3) the evidence presented at Santiago's disciplinary hearing satisfies due process requirements; (4) the defendants' acts were random and unauthorized and did not deprive Santiago of due process because he had adequate state remedies; and (5) the defendants enjoy qualified immunity from this suit. The issue on the state law negligence claims against Ware, Zangl and Danner is whether the defendants enjoy discretionary immunity.

We conclude Santiago had a liberty interest in not having his mandatory release date extended, but not in remaining in a community-residential confinement program. We conclude that Santiago waived all procedural due process objections, except for one: that the evidence presented at his hearing did not satisfy due process requirements. Because that objection is one of procedural rather than substantive due process, we conclude defendants prevail under the random and unauthorized conduct defense. Because of our disposition, we do not reach the issue of qualified immunity.[1] We also conclude defendants Ware,

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[1] Qualified immunity is immunity from suit. *Santiago v. Leik*, 179 Wis.2d 786, 790-91, 508 N.W.2d 456, 458 (Ct. App. 1993). Its purpose is to spare a public official not only from unwarranted liability

Zangl and Danner enjoy discretionary immunity from Santiago's state law negligence claim. We reverse.

I.
BACKGROUND[2]

Jaime Santiago was a thirty-seven-year-old inmate in the Wisconsin correctional system who resided at Plymouth Manor Nursing Home in Milwaukee under care for progressive amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease.[3] He had been transferred from Columbia Correctional Institution to the Community Residential Confinement (CRC) program on January 8, 1992, the same date on which he entered Plymouth Manor.[4]

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but from the "unwarranted demands customarily imposed upon those defending" a long, drawn-out lawsuit. *Id.* at 791, 508 N.W.2d at 458 (quoting *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). Although we would normally address the qualified immunity issue first, we have instead followed the order of issues presented in the State's supplemental brief on the effect of *Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293 (1995), on this appeal and in its initial brief to this court.

[2] Unless otherwise indicated, we draw our facts from the trial court's findings of fact and the undisputed facts of record.

[3] He died on November 20, 1995, while this appeal was pending. His sister, Lydia Santiago, has been substituted for him.

[4] Section 301.046(1), STATS., requires the Department of Corrections (DOC) to establish and operate the CRC program in order to "confine prisoners in their places of residence or other places designated by the department." DOC determines prisoner eligibility for the program, § 301.046(3), and must monitor a prisoner in confinement under the

By June 1992, Santiago's ALS had progressed to the point where he could not use his hands or stand without assistance. He had little or no use of most of his muscles. He had to be fed, bathed and cared for by others. By July 1992, his speech was badly impaired, making it difficult for others to understand him.

On June 18, 1992, Santiago had an argument with a cook at Plymouth Manor. The next day, the director of Plymouth Manor met with Jon Schubert, Santiago's probation and parole agent, and Schubert's supervisor, defendant Kathleen Ware. At the end of the meeting, the director decided Santiago would no longer reside at Plymouth Manor.

On June 20, 1992, Santiago was transferred to WCI, where he resided at the Health Services Unit. He remained in temporary lockup status pending investigation of the incident at Plymouth Manor.

On June 29, 1992, Schubert prepared a conduct report on the incident. He did not interview Santiago or the cook about their argument.[5] He did not personally determine the nursing

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program by the use of an electronic device "worn continuously on the prisoner's person." Section 301.046(5).

[5] In the prison system a conduct report operates as the equivalent of a police report and criminal complaint. WISCONSIN ADM. CODE § DOC 303.66(1) requires in relevant part: "[A]ny staff member who observes or finds out about a rule violation shall do any investigation necessary to assure himself or herself that a violation occurred, and if he or she believes a violation has occurred, shall write a conduct report." In the conduct report, the staff member must "describe the

home rules Santiago had violated. He relied on another correctional officer's recommendation for the charges he made against Santiago. The conduct report alleged that Santiago violated WIS. ADM. CODE §§ DOC 303.16 (threats), 303.28 (disruptive conduct), and 303.63 (violation of institution policies and procedures). The report did not specify the pertinent institution policies or procedures.

Serving as acting security director, Ware reviewed the conduct report. She incorrectly classified the offenses as major under WIS. ADM. CODE § DOC 303.68(3) without looking at that provision. WISCONSIN ADM. CODE § DOC 303.68(3) lists certain DOC rule violations as automatic major offenses. None of Santiago's charged violations fell into this category.[6]

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facts in detail and what other staff members told him or her, and list all sections [of the disciplinary rules contained in WIS. ADM. CODE ch. DOC 303] which were allegedly violated...." WIS. ADM. CODE § DOC 303.66(2).

The security director at the institution where the inmate resides must review the conduct report to determine if the facts alleged could support a finding of guilt for the alleged specified violations of the DOC code. WIS. ADM. CODE § DOC 303.67(1) and (3). After the security director's review, the conduct report is served upon the inmate. *See* WIS. ADM. CODE §§ DOC 303.75(1) and 303.76(1).

[6] A major offense is a violation of a disciplinary rule for which a major penalty may be imposed. WIS. ADM. CODE § DOC 303.68(1)(c). A major penalty may include imposition of adjustment or program segregation, loss of earned good time or extension of a mandatory release date. WIS. ADM. CODE § DOC 303.68(1)(a). All other offenses are classified as minor. A minor penalty may consist of reprimand, loss of recreation privileges, building or room

On July 1, 1992, Sergeant Alvin Krueger served Santiago with the conduct report and with the Notice of Major Disciplinary Hearing Rights Form. That form contains a section entitled "Waiver of Formal Due Process (Major) Hearing," to be completed by the inmate. When Krueger helped Santiago fill out the form, Krueger mistakenly marked a box in the middle of the form to indicate Santiago waived his right to a formal due process hearing. Santiago pointed out the mistake, and Krueger scratched it out. Krueger did not check a second box, located at the bottom of the form, that also would indicate waiver of a formal due process hearing.

On July 20, 1992, defendant Todd Zangl, a Division of Intensive Sanctions supervisor, held a hearing at WCI on the conduct report. Santiago had not been told that Zangl was coming to hold the hearing, and he had not been contacted by an advocate or prepared a defense. He had not been told which policy or procedure he was charged with violating under WIS. ADM. CODE § DOC 303.63.

Zangl conducted the hearing as a "waiver hearing" rather than a due process hearing.[7] Zangl did not carefully review

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confinement, loss of a specific privilege, extra duty or restitution. WIS. ADM. CODE § DOC 303.68(1)(b) and (1)(d).

[7] Both types of hearings are used to determine an inmate's guilt or innocence of the charges contained in a conduct report. Inmates accused of major violations may waive the right to a due process hearing in writing at any time. WIS. ADM. CODE § DOC 303.76(2). The inmate who waives a due process hearing has a hearing (a waiver hearing) using the same procedures as for minor violations. *Id.* The inmate does not have a staff advocate and may not confront witnesses

Santiago's Waiver of Major Hearing Form, despite his responsibility to do so, and he missed the cross-out in the waiver box. No rule or regulation requires a hearing officer before holding a waiver hearing to speak with the inmate to verify that he has waived his due process rights. Because Zangl could not understand Santiago, he asked Holly Meier, a nurse at WCI. to translate. With her help, Santiago told Zangl he wanted a due process hearing, but Zangl continued with the waiver hearing.

At the conclusion of the hearing, Zangl found Santiago guilty of violating WIS. ADM. CODE §§ DOC 303.28 (disruptive conduct) and 303.63 (violation of institution policies and procedures) and not guilty of violating WIS. ADM. CODE § DOC 303.16 (threats). Zangl imposed a ten-day extension of Santiago's mandatory release date and referred him to the program review committee (PRC).[8] On July 21, 1992, the PRC

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or have witnesses testify on his or her behalf. WIS. ADM. CODE § DOC 303.75(4).

[8] A PRC approves all inmate placements in CRC. WIS. ADM. CODE § DOC 327.06(6). Inmates in CRC must abide by the procedures and rules of any facility in which they are housed. WIS. ADM. CODE § DOC 327.09(1)(d). If, after a due process hearing, the department determines the inmate has violated the rules of the facility in which the inmate is held or to which the inmate is assigned, the case is referred to the PRC for review and possible termination of CRC status. WIS. ADM. CODE §§ DOC 327.10(3), 327.11(3)-(6) and 327.13. For purposes of termination, the PRC consists of three members--a social worker, a correctional officer and a member of the department supervisory staff. WIS. ADM. CODE § DOC 327.11(1). The department may temporarily remove the inmate from CRC status pending the outcome of a disciplinary due process hearing or PRC review. WIS. ADM. CODE § DOC 327.11(4). The due process hearing must generally be conducted in accordance with WIS. ADM.

terminated Santiago from CRC. The trial court found that as a result of referral to PRC, Santiago remained at WCI, in the hospital, until June 30, 1993.[9]

Santiago appealed Zangl's determination to Dennis Danner, a Division of Intensive Sanctions supervisor. Santiago cited as ground for his appeal only that he was not guilty and Zangl had not considered his account of what happened. On September 1, 1992, Danner affirmed Zangl's decision. Danner found that Zangl considered Santiago's account of what happened before rendering his decision and that "Santiago's behavior [at Plymouth Manor] created a risk of serious disruption and risk of injury to another person."

On September 9, 1992, Santiago filed his complaint in circuit court. While that action was pending, Danner ordered a rehearing on Santiago's conduct report. Santiago received a due process hearing on February 8, 1993, before a new examiner, Daniel Benzer. Santiago had an advocate. Schubert was the only witness. Examiner Benzer found Santiago not guilty of violating WIS. ADM. CODE § DOC 303.63 (violation of institution policies and procedures) and guilty of violating WIS. ADM. CODE § DOC 303.28 (disruptive conduct). He imposed a

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CODE §§ DOC 303.64 to 303.87. WIS. ADM. CODE § DOC 327.13. The parties have not addressed whether a waiver hearing may be used to terminate a CRC assignment.

[9] On June 30, 1993, Santiago was transferred back to CRC and admitted to a nursing home in Janesville. On October 11, 1993, he was transferred to the Marion Catholic Home in Milwaukee where, on July 27, 1994, he was charged with making threats and transferred back to Waupun, where he remained throughout the trial.

ten-day extension of Santiago's mandatory release date, without a referral to the PRC.

II.
TRIAL COURT DECISIONS

Santiago's complaint alleged defendants had: (1) violated his right to due process under the Fourteenth Amendment of the United States Constitution and (2) negligently performed ministerial duties.[10] He requested compensatory and punitive damages for each day he spent out of the CRC program and for violation of his rights, and "[a]ll other and further relief deemed appropriate."

A. Pretrial Decisions

The parties filed numerous motions for summary judgment and reconsideration. We summarize the trial court's four written opinions on the motions.

1. Section 1983 Claim

The court ruled that Santiago's procedural due process rights were violated at the first conduct report hearing because he did not have a staff advocate or an adequate opportunity to prepare a defense. Santiago did not waive his § 1983 claims by failing to raise the waiver hearing issue in his administrative appeal before Danner. Santiago had been denied substantive due

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[10] The complaint also sought damages for defendants having deprived him of his right to a remedy guaranteed by art. I, § 9 of the Wisconsin Constitution. We deem Santiago to have abandoned this claim by his failure to offer argument or evidence to support it.

process because insufficient evidence existed on which to find him guilty. The rehearing in February 1993 was "an incomplete cure" for the constitutional deprivations Santiago sustained in the first hearing.

The court held Santiago's intent not to waive a full due process hearing was undisputed but that a factual dispute existed whether his attempt to communicate that intent to Zangl was effective.

The court held that Zangl was not entitled to qualified immunity from suit on Santiago's claim that Zangl had violated his procedural and substantive due process rights. The court ruled that Zangl unreasonably held the hearing if he knew Santiago had not waived his due process rights. If the fact-finder found at trial that Santiago had effectively protested the waiver of his full due process rights, Zangl was not entitled to qualified immunity from suit on Santiago's procedural due process claim. Zangl had no qualified immunity regarding Santiago's claim that Zangl had violated his substantive due process right since the requirement that a prison official have "some evidence" to support a finding of guilt had been clearly established prior to Santiago's hearing before Zangl.

The court held that Danner was not qualifiedly immune from Santiago's procedural and substantive due process claims. The court ruled that Danner had a duty to review the documents presented at the conduct report hearing, including the waiver forms. The court ruled that Danner's "affirming Zangl's failure to provide plaintiff with a full due process hearing, absent an effective waiver, was objectively unreasonable." Danner's affirming "Zangl's finding of guilt without some evidence was

also objectively unreasonable." Consequently, Danner was not entitled to qualified immunity.

The court held that Zangl could not invoke the "random and unauthorized conduct" defense because Zangl's conduct was not "unauthorized" and because the state failed to provide an adequate postdeprivation remedy in the administrative appeal.

The court's pretrial decisions do not rule on Santiago's § 1983 claim against Ware.

2. State Claim for Common Law Negligence

The court ruled that because his duties were ministerial, Zangl was not entitled to discretionary immunity. On Santiago's state law claim for negligence, Danner was not entitled to discretionary immunity because he had a ministerial duty to determine whether Santiago had checked the waiver box. Danner was, however, entitled to discretionary immunity regarding his evaluation of the hearing record to determine whether sufficient evidence existed to find Santiago guilty. Ware was entitled to immunity because the act of selecting offenses involves discretion.

B. Trial Court's Findings of Fact and Conclusions of Law

After a three-day bench trial, the court found that as a direct result of Zangl's findings of guilt and referral of plaintiff to the PRC, Santiago's security classification was changed from minimum to maximum, his CRC status was terminated, and he was held at WCI until June 30, 1993. The court found that had the PRC conducted its own review without both major rule

violations on Santiago's record instead of relying on Zangl's hearing, it was unlikely that the PRC would have changed his security classification, and he would have been placed in another nursing home. Santiago suffered depression by being placed at WCI Health Services Unit (HSU) and attempted suicide. The court described HSU as "Dickensian in its vintage and bleakness."

The court concluded that Zangl had violated Santiago's right to due process because he recklessly disregarded Santiago's desire for an advocate and for a due process hearing. Zangl further recklessly disregarded Santiago's rights because: (1) he failed to determine under WIS. ADM. CODE § DOC 303.63 both the lack of notice of charge and "the requirements of that section" and (2) he found Santiago guilty of disruptive behavior on non-attributed evidence by drawing improper inferences from Santiago's statement and by failing to list in his written decision the portions of Santiago's statement supporting his determination of guilt.

The court concluded that Danner had violated Santiago's right to due process because he recklessly disregarded his duties to independently evaluate the waiver form, the WIS. ADM. CODE § DOC 303.63 charge, the designation of the violations as major under WIS. ADM. CODE § DOC 303.68(3), the lack of attribution to "facts" contained in the conduct report, and the contents of plaintiff's statement to defendant Zangl.

The court determined that Zangl's and Danner's actions constituted an "abuse of power" and that they had recklessly breached their state law duties to provide Santiago with due process protections. The court concluded that Ware had

negligently and recklessly violated Santiago's "due process right to have his alleged offenses properly charged and classified."

The trial court awarded Santiago $500 damages for Zangl's violations of his due process rights alone without reference to the further damages he suffered as a result of the PRC review. The court awarded Santiago $10,000 damages against Ware, Zangl and Danner for the injuries caused by defendants' violations of his due process rights and Santiago's attorney fees and costs. Because defendants seemed to have been inadequately trained and the court inferred they bore no malice, the court did not award punitive damages. The court declared that Zangl and Danner had deprived Santiago of due process by denying him a due process hearing and by finding him guilty without some reliable evidence of guilt. It ordered expungement of the ten-day extension of Santiago's mandatory release date.

III.
SANTIAGO'S § 1983 CLAIMS

A. Liberty Interest

Santiago grounds his § 1983 claim on his contention that he was deprived of liberty interests without due process of law. He argues he has liberty interests in not having his mandatory release date extended and in maintaining his CRC status. We agree he has a liberty interest in not having his mandatory release date extended. We hold he has no liberty interest in maintaining his CRC status.

Certain liberty interests inhere in the Due Process Clause--such as the conditional freedom held by parolees and

probationers--and are not subject to deprivation without adherence to strict procedural safeguards. *Harper v. Young*, 64 F.3d 563, 564 (10th Cir. 1995), *cert. granted*, 116 S. Ct. 1846 (1996) (citing *Morrissey v. Brewer*, 408 U.S. 471 (1971), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)). More commonly, an inmate's liberty interests are created by state law. *Harper*, 64 F.3d at 564. In *Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293 (1995), the Supreme Court held that while states may create liberty interests protected by the Due Process Clause, those

> interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Sandin, ___ U.S. at ___, 115 S. Ct. at 2300 (citations omitted). For that reason, courts need no longer engage in "the search for a negative implication from mandatory language in prison regulations" previously required by *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Kentucky Dep't. of Corrections*, 490 U.S. 454 (1989). *Sandin*, ___ U.S. at ___, 115 S. Ct. at 2300.

The *Sandin* court held that a prisoner had no liberty interest in remaining free from segregated confinement. However, it distinguished segregated confinement as a discipline from cases "where the State's action will inevitably affect the duration of his sentence." *Sandin*, ___ U.S. at ___, 115 S. Ct. at 2302. An inmate's interest in his mandatory release date is like his interest in good-time credits. A liberty interest in good-

time credits is one of "real substance and is sufficiently embraced within Fourteenth Amendment `liberty.'" *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). In Wisconsin, a state inmate is entitled to mandatory release on parole when he has completed two-thirds of his sentence, unless violations of regulations have extended his mandatory release date.[11] We conclude that under *Sandin*, Santiago retains a liberty interest in not having his mandatory release date extended.[12]

We turn to Santiago's loss of his CRC assignment and his return to WCI. Neither event imposed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, ___ U.S. at ___, 115 S. Ct. at 2300. His transfer to WCI subjected him to conditions no

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[11] Section 302.11, STATS., provides in relevant part:

> (1) [E]ach inmate is entitled to mandatory release on parole by the department. The mandatory release date is established at two-thirds of the sentence....
>
> (2)(a) Any inmate who violates any regulation of the prison or refuses or neglects to perform required or assigned duties is subject to extension of the mandatory release date as follows: 10 days for the first offense, 20 days for the 2nd offense and 40 days for the 3rd or each subsequent offense.

[12] Other courts agree. *See McGuinness v. Dubois*, 75 F.3d 794, 797 n.3 (1st Cir. 1996); *Gotcher v. Wood*, 66 F.3d 1097, 1100 (9th Cir. 1995); *Nelson v. McBride*, 912 F. Supp. 403, 406 (N.D. Ind. 1996); *Priest v. Gudmanson*, 902 F. Supp. 844, 846 (E.D. Wis. 1995).

different from those ordinarily experienced by large numbers of other inmates. *See Dominque v. Weld*, 73 F.3d 1156, 1160 (1st Cir. 1996) (holding that under *Sandin*, inmate did not have state-created liberty interest in work release program);[13] ***but see***

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[13] The first circuit's reasoning is persuasive. Were Santiago's argument to prevail:

> [W]e would open the door to finding an "atypical ... restraint" whenever an inmate is moved from one situation to a significantly harsher one that is, nonetheless, a commonplace aspect of prison existence. For example, a liberty interest could be claimed if an inmate were moved into less agreeable surroundings than his initial placement. Similarly, a liberty interest might be claimed whenever authorities or the state legislature decided to eliminate or cut back work release programs or furloughs. Such changes, painful to those affected, could be regarded under plaintiff's argument as implicating liberty interests even though the prisoner was never placed in conditions going beyond the customary rigors of prison life. Such an outcome, we believe, would directly conflict with *Sandin*'s teachings. *Sandin*'s new standard was expressly adopted by a majority of the Supreme Court "to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." [*Sandin*], 115 S. Ct. at 2299. The Court plainly intended to eliminate the basis for federal due process claims stemming from internal transfers and status changes that do not result in "atypical hardship," *i.e.*,

Roucchio v. Coughlin, 923 F. Supp. 360, 374 (E.D.N.Y., 1996). While WCI may be "Dickensian in its vintage and bleakness," that can hardly be said to be at variance with the ordinary incidents of prison life. Indeed, it *is* life at WCI.

Nor, as Santiago argues, is a liberty interest created by the requirement in WIS. ADM. CODE § DOC 327.11(3) that an inmate have a "due process hearing" before his CRC status is terminated. This is the type of "search for a negative implication from mandatory language" which courts need no longer make. *Kirsch v. Endicott*, 201 Wis.2d 702, 712, 549 N.W.2d 761, 765 (Ct. App. 1996) (citing *Sandin*, ___ U.S. at ___, 115 S. Ct. at 2300).

Santiago cites *Harper*, 64 F.3d at 566-67, and *Edwards v. Lockhart*, 908 F.2d 299 (8th Cir. 1990), for the proposition that his CRC assignment was more like that of a parolee than an inmate, and therefore he possessed a liberty interest in CRC assignment. The *Harper* court reviewed Oklahoma's Pre-parole Conditional Supervision program, in which participants remained in "constructive custody" of the department of corrections but worked and resided beyond the confines of a state penal institution.

> The liberty associated with a life outside the walls of a penal facility dwarfs that available to an inmate. It is the freedom to "be gainfully employed," "to be with family and friends," and "to form the other

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> hardship beyond the norms of ordinary prison life.

Dominque v. Weld, 73 F.3d 1156, 1160 (1st Cir. 1996).

> enduring attachments of normal life." *Morrissey*, 408 U.S. at 482, 92 S. Ct. at 2601. It is the ability to reside in a home of one's own, without bars or fences or bonds, beyond the immediate authority of guards or wardens. The passage outside the walls of prison does not simply alter the degree of confinement; rather, it works a fundamental change in the *kind* of confinement, a transformation that signals the existence of an inherent liberty interest and necessitates the full panoply of procedural protections outlined in *Morrissey*. *See, e.g., id.* at 481-84, 92 S. Ct. at 2600-02.

Harper, 64 F.3d at 566.

The *Edwards* court viewed parole and work release under an Arkansas program as a continuum, with more freedom and self-determination associated with parole and less with work release. *Edwards*, 908 F.2d at 302. The Arkansas' work/study release program, in which prisoner participants could live and work outside an institutional facility under the close supervision of a parole officer, was more like parole and therefore created a liberty interest arising from the Due Process Clause.

> Certainly Edwards is subject to more constraints in the ... program than she would be if on parole, but we find determinative the fact that she has been released from institutional life into society. The constraints applied to Edwards serve to guide her in the outside world, not ... to confine her to the equivalent of an institutional life.

Edwards, 908 F.2d at 302-03.

However, work release programs which require inmates to return daily to correctional institutions do not create a liberty interest inherent in the Due Process Clause. *Id.* at 301-02 (citing *Brennan v. Cunningham*, 813 F.2d 1 (lst Cir. 1987); *Hake v. Gunter*, 824 F.2d 610 (8th Cir. 1987); *Whitehorn v. Harrelson*, 758 F.2d 1416 (11th Cir. 1985)).

CRC is closer to work release than parole. CRC is not a release from institutional life, but an extension of it. Section 301.046, STATS., establishes the community residential confinement program as a correctional institution within the Department of Corrections.[14] DOC "confine[s] prisoners in their

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[14] Section 301.046, STATS., provides in relevant part:

> (1) The department shall establish and operate a community residential confinement program as a correctional institution under the charge of a superintendent. Under the program, the department shall confine prisoners in their places of residence or other places designated by the department....
>
> (2) Inmates confined under sub. (1) are under the care and control of the institution, subject to its rules and discipline and subject to all laws pertaining to inmates of other correctional institutions....
>
> ....
>
> (5) The department shall monitor any prisoner's confinement under sub. (1) by the use of an electronic device worn continuously

places of residence or other places designated by the department." Section 301.046(1). CRC participants are "prisoners" and "inmates." Section 301.046; WIS. ADM. CODE DOC § 327. CRC inmates must "wear an electronic device continuously on the inmate's person." WIS. ADM. CODE § DOC 327.09(1)(q). They are subject to all DOC disciplinary codes as modified by WIS. ADM. CODE § DOC 327.09(2) and remain in the legal custody of, and in institutional status with, the Department of Corrections. Section 301.046(2); WIS. ADM. CODE § DOC 327.07(5). After thirty days in CRC placement, an inmate may participate in leisure time activities but only with prior approval of a CRC staff member. WIS. ADM. CODE § DOC 327.16(5). Special conditions may be placed on the inmate's mail, visits and telephone calls. WIS. ADM. CODE § DOC 327.16(7). The CRC inmate's residence may be searched at any time. WIS. ADM. CODE § 327.21(1). The Department of Corrections continues to provide the inmate on CRC assignment with medical care if the inmate does not have private health insurance. WIS. ADM. CODE § DOC 327.16(3).

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on the prisoner's person or by the confinement of the prisoner in supervised places designated by the department. The department may permit the prisoner to leave confinement for employment, education or other rehabilitative activities.

(6) Any intentional failure of a prisoner to remain within the extended limits of his or her confinement or to return within the time prescribed by the superintendent is considered an escape under s. 946.42(3)(a).

Even if a CRC inmate resides in his home, he is confined. He remains electronically monitored as if he were behind bars and fences and within "the immediate authority of guards or wardens." *Harper*, 64 F.3d at 566. He can be charged with escape should he leave without permission. Section 301.046(6), STATS.

Because Santiago had no liberty interest in his CRC status, he cannot recover under § 1983 for loss of that status and the resulting return to WCA.

B. Waiver of Due Process Claims

The State contends that because in his administrative appeal to Danner from Zangl's decision, Santiago did not claim his procedural due process rights were violated at the disciplinary hearing, the trial court should have granted summary judgment dismissing his due process claim on those errors against Zangl and Danner. We agree.[15]

Our discussion is relevant at this point only to Santiago's liberty interest in not having his mandatory release date extended.

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[15] The State also argues defendants' actions were random and unauthorized and postdeprivation remedies were adequate, defendants were entitled to qualified immunity, and the trial court's finding that Santiago objected at the disciplinary hearing to the denial of his due process rights was clearly erroneous. Because we conclude Santiago waived his procedural due process claims (other than his sufficiency of the evidence claim) on administrative appeal, we do not reach these issues.

Whether summary judgment should have been granted is a question of law we decide without deference to the trial court's decision. *Lentz v. Young*, 195 Wis.2d 457, 468, 536 N.W.2d 451, 455 (Ct. App. 1995). Summary judgment procedure is used to determine whether a genuine issue of material fact exists and must be tried. *Grams v. Boss*, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980), is one of the many cases describing summary judgment methodology. We need not repeat it. When, as here, the material facts are substantially undisputed, we forego the step-by-step analysis that methodology requires.

Citing *Felder v. Casey*, 487 U.S. 131 (1988),[16] the trial court held that a state court may not require a complainant to exhaust state administrative remedies before bringing a § 1983 action unless the complainant falls under an exception to the exhaustion of administrative remedies rule. Since no exception applied, the court concluded Santiago had not waived his 42 U.S.C. § 1983 claim by failing to claim in his administrative appeal that his due process rights had been violated.

The doctrines of waiver and exhaustion are distinct in their application to § 1983 actions brought by inmates. An inmate cannot be required to exhaust his administrative remedies,[17] but the inmate can waive his claim under § 1983

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[16] "In *Felder v. Casey*, we ... held that a Wisconsin notice-of-claim statute that effectively shortened the statute of limitations and imposed an exhaustion requirement on claims against public agencies and employees was pre-empted insofar as it was applied to § 1983 actions." *Howlett v. Rose*, 496 U.S. 356, 377 (1990).

[17] The federal Civil Rights of Institutionalized Persons Act of 1980 (CRIPA) required adult prisoners to exhaust state administrative

when he pursues his administrative remedies without seeking review of errors he later claims had violated his due process rights.

A prisoner waives his due process rights by failing to object when those rights are denied at an inmate disciplinary hearing. *Saenz v. Murphy*, 162 Wis.2d 54, 57, 469 N.W.2d 611, 612 (1991). The waiver entitles prison officials alleged to have denied those rights to summary judgment. ***Id.*** at 67, 469 N.W.2d at 617. The waiver is effective even if it was not voluntary and intelligent. *Id.* at 64, 469 N.W.2d at 616.

The *Saenz* court distinguished between the doctrines of waiver and exhaustion of remedies, but noted they had the same policy underpinnings. The court said requiring parties to raise issues before the trier of fact assists the administration of justice by avoiding wasteful proceedings on appeal and remand to resolve matters that could have been resolved in previous proceedings. *Id.* at 66, 469 N.W.2d at 616-17. Those same reasons "motivated courts to require inmates to exhaust their administrative remedies." *Id.* at 66, 469 N.W.2d at 616. "If Saenz can be required to exhaust his administrative remedies

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remedies if the remedies provided by the state comply with federal standards. *Casteel v. Vaade*, 167 Wis.2d 1, 5, 481 N.W.2d 476, 477 (1992). Wisconsin's Inmate Complaint Review System did not comply with these federal standards. *Id.*

The Prison Litigation Reform Act, enacted April 26, 1996, requires exhaustion of administrative remedies regardless whether those remedies have been certified. Pub. L. No. 104-134, § 803 (1996). Because of our disposition, we have not asked the parties to brief whether the Prison Litigation Reform Act should be applied to pending § 1983 appeals.

before bringing a sec. 1983 action, he can be required to object to an alleged violation of his due process rights before the adjustment committee." *Id.* at 66, 469 N.W.2d at 617.

One year later, our state high court held that a prisoner need not exhaust his administrative remedies before bringing a § 1983 action in state court. *Casteel v. Vaade*, 167 Wis.2d 1, 5, 481 N.W.2d 476, 477 (1992). The court "disavow[ed] any intimation in *Saenz v. Murphy* that prison inmates must exhaust their administrative remedies before they may commence a sec. 1983 action." *Casteel*, 167 Wis.2d at 21 n.18, 481 N.W.2d at 484 (citations omitted). The *Casteel* court addressed only *Saenz*'s discussion of the exhaustion doctrine and not the *Saenz* waiver doctrine.

While *Saenz* reviewed errors at a disciplinary hearing, we apply without hesitation its waiver doctrine to administrative appeals in the prison setting. A state need not give its prisoners a right of administrative appeal from disciplinary decisions. *Cf. Wolff*, 418 U.S. at 563-70 (inmates must receive advance written notice of alleged violations and a written statement of the facts found, the evidence relied upon, and the reasons for the disciplinary action, and they should be allowed to call witnesses and present documentary evidence and to have the assistance of other inmates or a staff advocate). Thus, Wisconsin affords prisoners more process than the Fourteenth Amendment requires.[18] The procedure for major violation hearings includes

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[18] The administrative appeals from inmate disciplinary proceedings have various purposes, including increasing uniformity in decision-making, eliminating or reducing abuses of discretion and providing an opportunity for the institution's superintendent to review the work of subordinates. WIS. ADM. CODE § DOC 303.76(7), Appendix.

the right of administrative appeal. WIS. ADM. CODE § DOC 303.76. In that sense, an administrative appeal is an extension of the disciplinary hearing process.

Santiago's administrative appeal from hearing officer Zangl's decision to Danner did not claim procedural due process defects except that (liberally construed) it claimed that insufficient evidence supported the findings of guilt. Santiago's administrative appeal, if successful, could have corrected the claimed errors in the same process which he now contends denied him due process. We conclude he has waived his right to pursue a § 1983 claim on the errors he did not raise in his administrative appeal before Danner.[19]

Santiago argues that the *Saenz* waiver doctrine is inapposite because Danner had an independent obligation to review the hearing record regardless of whether Santiago raised the due process issue in his administrative appeal. We disagree. In *Saenz*, the prisoner claimed he had been denied his right to call a witness. The court recognized that the state has the burden in prison disciplinary proceedings "to produce at the prisoner's disciplinary hearing the witnesses requested by the prisoner or their signed, written statements." *Id.* at 64, 469 N.W.2d at 615. Although the record failed to disclose whether the State had met that duty, the *Saenz* court ruled: "[A]ny error committed by the state was waived by Saenz when he walked out of the disciplinary hearing without objecting to the absence of Dr. Strangmen or his signed, written statement." *Id.* at 64, 469 N.W.2d at 616.

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[19] To paraphrase Chief Justice Rehnquist, they who invoke must not waive. *City of Columbus v. Leonard*, 443 U.S. 905 (1979) (Rehnquist, J., dissenting).

Consequently, notwithstanding Danner's duty to review the disciplinary hearing record for error, because Santiago did not raise denial of his procedural due process rights in his administrative appeal, he waived the right to pursue a due process claim against Zangl and Danner based on those denials. Assuming that Ware's improperly classifying the charged offenses denied Santiago due process, our waiver analysis as to his claims against Zangl and Danner also applies to his claim against Ware.

C. Sufficiency of the Evidence

Santiago argues that Zangl and Danner violated his right to substantive due process because they lacked sufficient and reliable evidence when they found he violated WIS. ADM. CODE § DOC 303.63, institutional policies and procedures, and WIS. ADM. CODE § DOC 303.28, disruptive conduct. The state asserts that the conduct report and Santiago's own statement provided sufficient evidence to support those findings.

1. "Some Evidence" Test

"Some evidence" must exist in order to support a finding of guilt in a prison disciplinary hearing. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985). Under the "some evidence" standard, the question is whether *any* evidence exists in the record that could support the conclusion and resultant disciplinary action against the prisoner. *Id.* at 455-56. If "some evidence" exists, that is sufficient evidence to satisfy due process. If no evidence exists, a finding of guilt violates due process.

In *Hill*, the evidence before the disciplinary board consisted of first-person testimony from a prison guard and copies of his written report. The guard testified he heard a commotion in a prison walkway and upon investigating, he discovered an inmate lying on the ground, bleeding from the mouth and with a swollen eye. The guard saw three inmates running from the scene, but the victim denied they were the persons who had assaulted him. Nonetheless, the three inmates were charged and disciplined for assault. *Id.* at 447-48.

While acknowledging both the absence of any direct evidence and the existence of contrary testimony, the Supreme Court held the record contained "some evidence" that could support the decision by the board to revoke good time credits for one of the three fleeing inmates. *Id.* at 456. The *Hill* Court did not weigh the admittedly "meager" evidence. It sought only to ensure that the record was not "so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary." *Id.* at 457.

WISCONSIN ADM. CODE § DOC 303.63 provides that "[v]iolations of any specific policies or procedures authorized" by the institution "are offenses." The record before Zangl and Danner contained no evidence of those policies or procedures. The evidence supporting the § DOC 303.63 charge was insufficient.[20]

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[20] Santiago was found not guilty of violating WIS. ADM. CODE § DOC 303.63 upon the rehearing by Benzer for this very reason. The trial court found that as a result of this conviction months earlier, Santiago lost his CRC status.

WISCONSIN ADM. CODE § DOC 303.28 states, "Any inmate who intentionally ... engages in, causes or provokes disruptive conduct is guilty" of disruptive conduct. "Disruptive conduct" is defined in part as "overt behavior which is unusually loud ... and may include arguments ... or loud talking, which may annoy another."

Relying on *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987), Santiago asserts he was convicted upon unreliable evidence. The *Cato* court explained that the information relied upon by the disciplinary board must bear "some indicia of reliability," and it held that a confidential informant's second-hand report was insufficiently reliable. *Id.* The only evidence offered in support of Santiago's guilt, he argues, was the information contained in the conduct report, which he equates with the confidential informant's statement in *Cato*. The trial court agreed with Santiago's assessment of the record.[21] We do not.

At the hearing, Santiago also made a statement which Zangl transcribed. Whether that statement contains some evidence that Santiago was guilty of disruptive conduct is a question of law which we decide without deference to the trial court's decision. That statement provides in relevant part:

> I had to get the R.N., Diana Brown to get my lock open. I have no use in my hands. I went out of my room to have her open my lock and to have her put my stuff away because I was anticipating going to

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[21] The trial court concluded there was *no* reliable evidence of Santiago's guilt because Zangl and Danner based their findings on the uncorroborated and unreliable hearsay evidence in the conduct report.

> the festival on the 19th of June. It was thereby coincidence that I had the opportunity to see the cook.... I tried to explain to him of the grievances [about the food] and we have to find a solution. Him, not understanding me, misinterpreted, or thought I was mental. He made it known to me that I was nothing but a motherfucker and that I should stay in my wheelchair and go to my room because he knows nothing about some such counsel. [?] That's when I stood by the counter and explained to him that in the morning or when he comes in that he and his supervisor and the president and I should sit down and iron this out before it gets out of proportion. I noticed hostility between both of us. That's when the aide, my aide put my lock on my chair and grabbed my hand and said, Jaime, forget it, wait till the morning and we'll straighten this out. The lock was on my chair. He grabbed the lock and my hand and that's when the lock came into play. The man was never threatened.... The yelling was an interpretation of every individual. He didn't understand me and I had to repeat at least three times the issue itself. That's when he did push me over the counter and said sit down, mental defect.... I did call the police because I felt point blank that his friends and he were going to try something.

Santiago's first-hand statement meets the *Hill* "some evidence" test. He acknowledged "yelling" and "hostility between" him and the cook. We therefore need not determine whether the conduct report evidence was reliable.

We conclude Zangl and Danner violated Santiago's due process rights because no evidence existed to find Santiago guilty of violating WIS. ADM. CODE § DOC 303.63, Institutional Policies and Procedures. However, sufficient evidence existed in Santiago's written statement from which the defendants could find he violated WIS. ADM. CODE § DOC 303.28, Disruptive Conduct.

2. Procedural or Substantive Due Process

WISCONSIN ADM. CODE § DOC 303.76(6) provides that an inmate in a disciplinary hearing must be found guilty by a preponderance of evidence. The state argues that if Zangl or Danner found Santiago guilty of charges without a preponderance of evidence, their conduct violated § DOC 303.76(6), and was therefore random and unauthorized.

The random and unauthorized conduct defense applies only to procedural due process claims.[22] The parties dispute whether a violation of the *Hill* "some evidence" standard is a procedural or a substantive due process violation.

"The Fourteenth Amendment contains only one Due Process Clause. Though it is sometimes helpful, as a matter of doctrine, to distinguish between substantive and procedural due

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[22] SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983 § 3.09, at 176 n.17 (3d ed. 1991) ("*Parratt* only applies in procedural due process cases where the plaintiff challenges the absence of a hearing; it does not and should not apply where the plaintiff challenges the defendant's conduct irrespective of a hearing. That is, *Parratt* does not apply to substantive due process ....").

process ... the two concepts are not mutually exclusive, and their protections often overlap." *Albright v. Oliver*, 510 U.S. 266, 301 (1994) (Stevens, J., dissenting). Indeed, legal commentators differ over whether the "some evidence" standard is procedural or substantive.[23] *See* Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 364 (1993) (The *Hill* Court "suggested that a reviewing court should hold a decision to deprive a prisoner of good time credits substantively arbitrary only if there were no evidence to support it."); Gerald L. Neuman, *The Constitutional Requirement of `Some Evidence,'* 25 SAN DIEGO L. REV. 631, 670 (1988) ("[T]he `some evidence' standard makes sense as a procedural due process doctrine relating to issues narrower than total substantive rationality.").

The *Hill* Court held "that revocation of good time does not comport with `the minimum requirements of procedural due process' unless the findings of the prison disciplinary board are supported by some evidence in the record." *Hill*, 472 U.S. at 454 (citation omitted). The "some evidence" standard grew directly from the procedural requirement established in *Wolff v. McDonnell*, 418 U.S. 539 (1974), that a prisoner must receive a written statement by the fact-finder of the evidence relied on and the reasons for any disciplinary action. *Hill*, 472 U.S. at 454.

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[23] The protections of substantive due process have for the most part been accorded to "fundamental rights" generally found in the areas of marriage, family, procreation and the right to bodily integrity. *Albright v. Oliver*, 510 U.S. 266, 272 (1994). Substantive due process also bars government conduct that "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted).

While acknowledging that prisoners have circumscribed constitutional rights, the *Wolff* Court enumerated minimum *procedural* safeguards necessary to ensure fairness in prison disciplinary proceedings. *Wolff*, 418 U.S. at 539. In *Wolff*, the Court did not, however, specify the quantum of evidence necessary to support the fact-finder's decision. *Hill* solved this ambiguity with the "some evidence" standard.

Santiago contends the seventh circuit has construed *Hill* to mean that the "some evidence" standard is a "substantive requirement" to protect the procedural due process rights established in *Wolff*. He cites *Aikens v. Lash*, 514 F.2d 55, 60 (7th Cir. 1975), *rev'd on other grounds*, 425 U.S. 947 (1976); *Culbert v. Young*, 834 F.2d 624, 630 (7th Cir. 1987), *cert. denied*, 485 U.S. 990 (1988); and *Chavis v. Rowe*, 643 F.2d 1281, 1287 (7th Cir. 1981), *cert. denied*, 454 U.S. 907 (1981). In *Aikens*, the court stated an inmate had a "substantive due process right not to be found guilty except by an appropriate quantum of evidence," but *Aikens* was decided a decade before *Hill*. *Aikens*, 514 F.2d at 60. *Chavis* restates *Aikens* and also precedes *Hill*. *Chavis*, 643 F.2d at 1287. The *Culbert* court referenced the "substantive standards set forth in *Hill*," but questioned whether *Hill* had lowered the quantum of evidence required by the *Aikens* court to sustain a prison disciplinary decision. *Culbert*, 834 F.2d at 630.
Dent v. West Virginia, 129 U.S. 114 (1899)).

Neuman suggests that the purpose of the "some evidence" standard is to ensure the constitutional fairness of the hearing, rather than the constitutional sufficiency of evidence regardless of the fairness of that hearing.[24]

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[24] If the "some evidence" standard required that administrative decisions implicating liberty interests have "an acceptably reasoned

[T]he requirement is procedural, and protects the individual's right to an impartial and conscientious decision on the merits, based on the evidence of record.... *A decision is not supported by "some evidence" when the discrepancy between the findings on which it rests and the evidence of record is so great as to indicate clearly that the findings were not in fact derived impartially from the record....* Requiring "some evidence" guards against

No published opinion in the seventh circuit has specifically held that the *Hill* "some evidence" standard is procedural or substantive. A majority of the circuits have applied the "some evidence" standard as a procedural due process requirement.[25]

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basis (or more) for every adjudicative decision," the strain on judicial resources would be "extraordinarily ambitious." Gerald L. Neuman, *The Constitutional Requirement of `Some Evidence,'* 25 SAN DIEGO L. REV. 631, 669 (1988). Every challenged case would "require independent scrutiny of the record to make sure that a `rational' decisionmaker could have reached the challenged decision on the evidence presented, in light of the apparently applicable substantive law and the legal burden of proof." *Id.*

[25] *See, e.g., McGuinness v. Dubois*, 75 F.3d 794, 800 (1st Cir. 1996) (*Hill* holds "that procedural due process is satisfied if the decision ... is supported by `some evidence' in the record."); *Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996) ("*Hill* ... only concerned *procedural* due process .... The issue in *Hill* was merely whether there was, and whether there needed to be, some evidence to support a prison disciplinary decision." (emphasis in original)); *Mitchell v. Maynard*, 80 F.3d 1433, 1445 (10th Cir. 1996) ("If there is some evidence ... then the requirements of procedural due process have been met."); *Williams v. Fountain*, 77 F.3d 372, 375 (11th Cir. 1996) (If there was

> Santiago argues that because "some evidence" helps protect an inmate from being arbitrarily found guilty, his substantive due process rights are implicated. We disagree. Procedural due process itself protects against arbitrary deprivations. When discussing procedural due process in prison disciplinary proceedings, the *Wolff* Court declared "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Wolff*, 418 U.S. at 558 (citing hearings that are not truly meaningful because the decisionmaker vitiates the individual's for input....

Neuman, *supra*, at 678 (emphasis in original).

Citing *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133-34 (1924), the *Hill* court said, "[T]he relevant question is whether there is any evidence in the record that could support the conclusion." *Hill*, 472 U.S. at 455-56. *Hill*'s citation of *Tisi* supports Neuman's analysis. The *Tisi* Court's review of the

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"a sufficient evidentiary basis ... then procedural due process concerns would be allayed."). *See also Hudson v. Edmonson*, 848 F.2d 682, 688 (6th Cir. 1988) (quoting and applying *Hill's* holding, "revocation ... does not comport with `the minimum requirements of procedural due process,' unless the findings ... are supported by some evidence in the record."); *Toussaint v. McCarthy*, 801 F.2d 1080, 1104 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Brown v. Frey*, 807 F.2d 1407 (8th Cir. 1986) (affirming district court's conclusion that inmate had been afforded procedural due process because prison disciplinary decision was supported by "some evidence"). No circuit, including the seventh, has interpreted *Hill* as raising a substantive due process issue.

evidence sought to ensure the fairness of the administrative hearing.

> The denial of a fair hearing is not established by proving merely that the decision was wrong. This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact or in drawing a wrong inference from the evidence. The error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one.

Tisi, 264 U.S. at 133.

We conclude that the "some evidence" standard is a procedural due process standard. The question is whether Zangl's and Danner's findings that Santiago violated WIS. ADM. CODE § DOC 303.76(6), Institution Policies, were "random and unauthorized."

3. Random and Unauthorized Acts

Generally, due process requires notice and an opportunity to be heard before a deprivation of life, liberty or property. *Irby v. Macht*, 184 Wis.2d 831, 843, 522 N.W.2d 9, 13, *cert. denied*, 115 S. Ct. 590 (1994). When a deprivation of a liberty interest results from the "random and unauthorized" acts of state employees, "providing meaningful predeprivation process is impracticable." *Id.* at 843, 522 N.W.2d at 14 (citing *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981)); *Zinermon v. Burch*, 494 U.S. 113, 128-29 (1990). Because the state cannot predict when such acts will occur, due process will be satisfied if

the state provides adequate postdeprivation remedies. *Irby*, 184 Wis.2d at 843, 522 N.W.2d at 14 (citing *Parratt*, 451 U.S. at 544).

Irby alleged that state prison employees violated ch. 303 of the Department of Corrections' disciplinary code by failing to give him prior notice of the disciplinary hearing, providing him the reasons for its decision, allowing him to call witnesses, and assigning a staff advocate free of conflict of interest. *Irby*, 184 Wis.2d at 846, 522 N.W.2d at 15. The *Irby* court concluded that the defendants lacked "authority to deprive Irby of any of these procedural rights," and their conduct was therefore "random and unauthorized." *Id.* at 846-47, 522 N.W.2d at 15.

We agree with the state that Zangl and Danner each had a duty to meet the preponderance of the evidence standard before finding Santiago guilty. WIS. ADM. CODE § DOC 303.76(6).[26] Their conduct violating that duty was random and unauthorized.

Hence, the question is whether adequate postdeprivation remedies were available to Santiago. As a result of Zangl's and Danner's unauthorized conduct, Santiago received a ten-day extension of his mandatory release date and a referral to the program review committee which resulted in termination of CRC status. Santiago failed to seek judicial relief by way of certiorari. Instead, he proceeded directly to the § 1983 and negligence action before us.

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[26] Santiago does not dispute that meeting the "preponderance of the evidence" standard would comply with the "some evidence" requirement.

The *Irby* court held that certiorari review provided an adequate remedy for Irby's loss of earned good time because the circuit court can order restoration of any lost good time and can expunge the prisoner's disciplinary record. *Id.* at 847, 522 N.W.2d at 15. We see no reason why certiorari would not be equally available to remedy the wrongful ten-day extension of Santiago's mandatory release date. As in *Irby*, expungement could be ordered by a certiorari court.[27]

IV.
STATE CLAIMS

Public employees are immune from personal liability for injuries resulting from the negligent performance of a discretionary act within the scope of the individual's public office. *C.L. v. Olson*, 143 Wis.2d 701, 710, 422 N.W.2d 614, 617 (1988). A discretionary act is one that involves choice or judgment. *Kimps v. Hill*, 200 Wis.2d 1, 23-24, 546 N.W.2d 151, 161 (1996) (quoting *United States v. Gaubert*, 499 U.S. 315, 325 (1991)).

An exception to immunity exists for ministerial acts. *Kimps v. Hill*, 187 Wis.2d 508, 513, 523 N.W.2d 281, 284 (Ct. App. 1994), *aff'd*, 200 Wis.2d 1, 546 N.W.2d 151 (1996). A public employee's duty is ministerial "only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty

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[27] Having disposed of the issues on other grounds, we do not decide whether the rehearing held in February 1993 before Danner was a complete cure for any constitutional deprivation that occurred during the first hearing.

that nothing remains for judgment or discretion." *Lister v. Board of Regents*, 72 Wis.2d 282, 301, 240 N.W.2d 610, 622 (1976). Whether a duty is ministerial is a question of law which we review without deference to the trial court. *Larsen v. Wisconsin Power & Light Co.*, 120 Wis.2d 508, 516, 355 N.W.2d 557, 562 (Ct. App. 1984). The state does not challenge the court's findings that the defendants negligently performed their duties.

We turn first to Ware's claimed immunity.[28] Santiago acknowledges that a decision to classify an offense as major or minor involves choice "in some cases," and is therefore discretionary. He argues, however, that Ware had a ministerial duty to look first at the list of offenses automatically classified as major under WIS. ADM. CODE § DOC 303.68(3) to see if it included the offenses charged against Santiago. Citing *Lister v. Board of Regents*, Santiago contends the automatic major provision limits choice and imposes a duty with such certainty that nothing remains for judgment or discretion.

In *Lister*, University of Wisconsin law students sued a university official, alleging he had negligently performed a ministerial duty of determining their residency status. *Lister*, 72 Wis.2d at 288-89, 240 N.W.2d at 616. The court reviewed the official's duties under the relevant statutes.

> Section 36.16(1)(a) provided that "a bona fide resident of the state for one year next preceding the

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[28] Prior to trial, the court granted Ware summary judgment on Santiago's negligence claim on the ground that she had discretionary immunity. In its statement of the case, the State says this decision was reconsidered. We have been unable to locate such a reconsideration.

> beginning of any semester for which such student registers at the university ... shall while he continues a resident of the state be entitled to exemption from nonresident tuition." Under sec. 36.16(3), in determining bona fide residence, several activities of the student "shall be considered." However, a student from another state who was in this state "principally to obtain an education" was not to be considered to have established a residence in Wisconsin by virtue of attendance at educational institutions.

Id. at 301, 240 N.W.2d at 622. The court held, "The statute did not prescribe the classification *process* with such certainty that nothing remained for the administrative officer's judgment and discretion." *Id.* (emphasis added).

Like the official in *Lister*, Ware engaged in a classification process. Ware exercised judgment in selecting and applying the relevant provisions of the administrative code to the facts presented. We reject Santiago's portrayal of the automatic classification as a threshold ministerial decision required for the later exercise of choice or judgment to determine if a non-automatic offense is major or minor. The classification determination is itself the *result* of choice and judgment, not a prerequisite.

The administrative code establishes a process for the classifying prison offenses as major or minor. Ware first had to review the appropriateness of the charges. WIS. ADM. CODE § DOC 303.67(3). For a minor offense, she could have dismissed the conduct report if the inmate was either unfamiliar with the rule, had not violated recently the same or a closely

related rule, was unlikely to repeat the offense if warned or counseled, or the purposes of the prison disciplinary code would not be furthered by writing a conduct report. WIS. ADM. CODE §§ 303.67(3)(a) and 303.65. Ware had to strike offenses not supported by the facts alleged, or could add offenses supported by the facts. WIS. ADM. CODE §§ 303.67(3)(b)-(c). She could refer the conduct report for further investigation. WIS. ADM. CODE § DOC 303.67(3)(e). After completing this review, involving judgment and choice, Ware then was required to "divide all remaining conduct reports into major and minor offenses." WIS. ADM. CODE § DOC 303.67(4).

That Ware may have been required to exercise her judgment, or that she may have done so wrongly, does not transform her exercise of judgment into a ministerial act. *See Lister*, 72 Wis.2d at 302, 240 N.W.2d at 622. Ware's exercise of judgment was an act of discretion.

Santiago argues that both Zangl and Danner had a non-discretionary duty to look at the waiver form to see if there had been a proper waiver.[29] An evaluation of Santiago's waiver form required analysis and judgment. The box indicating Santiago waived his right to a formal due process hearing had been checked, then crossed out. Interpreting the resulting composite mark required judgment. Moreover, as Santiago states in his recitation of facts, "[Zangl] did not ask Santiago about the incomplete waiver form, or whether he intended to

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[29] Santiago does not argue that Zangl had a non-discretionary duty to stop the waiver hearing even if, as the trial court found, Santiago voiced his objections to Zangl and requested a due process hearing. The State challenges that finding as clearly erroneous. We need not reach that issue.

waive his right to a formal due process hearing. There is no rule or regulation requiring hearing officers to verify that an inmate has waived his due process rights before holding a waiver hearing." Thus, it can hardly be said that the law imposed a duty upon Zangl that was "absolute, certain and imperative."

As to Danner, we again reject Santiago's attempt to isolate the evaluation of his waiver form from Danner's responsibilities as appeal officer. WISCONSIN ADM. CODE § DOC 303.76(7)(b) requires appeal officers to "review all records and forms pertaining to the appeal and make his or her decision within 10 days following receipt of the request." A review of the entire record on appeal involves judgment. As with Ware, that Danner may have been required to exercise judgment or that he did so wrongly does not transform his duties from discretionary to ministerial.

We conclude Ware, Zangl and Danner enjoy discretionary immunity from Santiago's negligence claims against them.

V.
CONCLUSION

Santiago's complaint should be dismissed in its entirety. Santiago had a liberty interest in not having his mandatory release date extended, but he had no liberty interest in remaining in the community residential confinement program. He waived all procedural due process objections to the extension of his release date except for the insufficiency of the evidence. When defendants Zangl and Danner found Santiago guilty of violating institutional policies and procedures, without supporting evidence, their acts were random and unauthorized. However, Santiago failed to pursue certiorari, an adequate judicial remedy

for the damage he suffered from those acts. Defendants Ware, Zangl and Danner enjoy discretionary immunity from Santiago's state law negligence claim.

We therefore reverse the judgment before us and direct that the complaint be dismissed.

By the Court.—Judgment reversed and cause remanded with directions.

No. 95-0079(C)

SUNDBY, J. (*concurring*). I concur in our mandate but not in the majority opinion.

Procedural due process requires adequate notice and an opportunity to be heard when the State proposes to take away a person's property or liberty. The State proposed to discipline Santiago for conduct violating prison regulations. The hearing officer, Todd Zangl, did not give Santiago a full due process hearing, which Santiago requested. However, the Sector Superintendent, Dennis A. Danner, recognized Zangl's error and ordered Daniel Benzer, a social services supervisor for the Division of Intensive Sanctions, to give Santiago a rehearing. Benzer gave Santiago a full due process hearing and found him not guilty of violating WCI's policies and practices, but guilty of disruptive conduct. Danner assigned Santiago an advocate who was allowed to call witnesses on Santiago's behalf and to present a defense.

Let's pause a moment to consider whose action the circuit court would have reviewed had Santiago pursued his certiorari remedy; not Zangl's, because whatever action he took was mooted when the conduct report was reheard. The court would have reviewed Benzer's finding that Santiago was guilty of disruptive conduct. How then is Zangl's and Danner's denial of Santiago's right to procedural due process implicated? There is no cause of action for an aborted denial of procedural due process as long as the mistake is corrected before there is a loss of liberty. We are not presented here with a deprivation of a liberty interest which was final, subject to correction by judicial action; here, the deprivation did not occur until after Santiago had been given all the process due him. I recognize that some federal circuits award damages for emotional distress caused by denial of procedural due process, *see Laje v. Thomason Gen.*

Hosp., 665 F.2d 724, 728 (5th Cir. 1982). However, in those cases the liberty interest was lost only after failure to provide procedural due process.

Zangl may have denied Santiago adequate notice and an opportunity to be heard; Danner may have compounded Zangl's error but nothing came of it. Santiago did not lose a liberty interest because of their acts because someone in the Division had the good sense to realize the potential liability and order the institution to proceed properly. The real issue on this appeal is whether the initial denial of notice and an opportunity to be heard may be corrected without liability. The answer on that score has got to be "yes." If not, every procedural mistake becomes a constitutional violation complete when the mistake is made. It is fundamental, however, that denial of procedural due process is not complete unless and until the person affected loses a protected property or liberty interest. Santiago did not lose a liberty interest until after the conduct hearing before Benzer where he had adequate notice of the charges against him and a fair opportunity to defend against those charges.

Santiago argues that he was denied substantive as well as procedural due process. Substantive due process is the right to be protected against arbitrary and wrongful government action regardless of the fairness of the procedures government uses to take the arbitrary action. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Santiago asserts that defendants deprived him of his liberty without even a "modicum" of evidence. *See Superintendent v. Hill*, 472 U.S. 445, 455 (1985). Santiago's claim is premature; until he has lost his liberty because of arbitrary and capricious governmental action he has not suffered a substantive due process deprivation. He has the right to appeal his potential loss of liberty by certiorari; the disciplinary action to which he may be subject may be set aside precisely because the evidence is insufficient. If the reviewing courts affirm

Santiago's loss of liberty, he may then pursue his remedy under 42 U.S.C. § 1983. The Civil Rights Act of 1871 created a federal tort because the freed slaves and Union sympathizers could not obtain relief in state courts. If Santiago's loss of liberty is affirmed by the Wisconsin courts, the federal courts are available to him to correct the constitutional wrong. However, the Wisconsin courts have not had an opportunity to review Santiago's conviction for violating prison regulations. Until that opportunity proves fruitless, Santiago has not lost his liberty because of arbitrary and capricious governmental action.

I therefore conclude that Santiago has not stated a claim under § 1983. For the same reasons, Santiago does not have a claim under state law. He simply has not been injured until his conviction and punishment have been affirmed. Conceivably, Santiago could state a claim if he alleged a conspiracy between the defendants to "frame" him and he could show that the charges against him were pretextual, masking an intent to prosecute him maliciously. I do not believe the facts alleged in Santiago's complaint and proof support such a claim.

For these reasons, I do not join in the majority opinion. The reasons assigned by the majority for reaching the same result I reach are unnecessary to our decision.

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

LYDIA SANTIAGO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAIME SANTIAGO,

Plaintiff-Respondent,

v. ERRATA SHEET

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANBL AND DENNIS DANNER,

Defendants-Appellants.

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Waukesha, WI 53188-1672

Court of Appeals District III
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Hon. Moria Krueger
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Stephen J. Nicks
Assistant Attorney General
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PLEASE TAKE NOTICE that the attached pages 37 through 41 are to be substituted for pages 37 through 41 in the above-captioned opinion which was released on September 30, 1996.

Dated this 13th day of February, 1997.

Santiago received a ten-day extension of his mandatory release date and a referral to the program review committee which resulted in termination of CRC status. Santiago failed to seek judicial relief by way of certiorari. Instead, he proceeded directly to the § 1983 and negligence action before us.

The *Irby* court held that certiorari review provided an adequate remedy for Irby's loss of earned good time because the circuit court can order restoration of any lost good time and can expunge the prisoner's disciplinary record. *Id.* At 847, 522 N.W.2d at 15. We see no reason why certiorari would not be equally available to remedy the wrongful ten-day extension of Santiago's mandatory release date. As in *Irby*, expungement could be ordered by a certiorari court.[27]

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[28] Prior to trial, the court granted Ware summary judgment on Santiago's negligence claim on the ground that she had discretionary immunity. In its statement of the case, the State says this decision was reconsidered. We have been unable to locate such a reconsideration. Nonetheless, we deem Ware to have waived the summary judgment decision in her favor.

> any semester for which such student registers at the university ... shall while he continues a resident of the state be entitled to exemption from nonresident tuition." Under sec. 36.16(3), in determining bona fide residence, several activities of the student "shall be considered." However, a student from another state who was in this state "principally to obtain an education" was not to be considered to have established a residence in Wisconsin by virtue of attendance at educational institutions.

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Adm. Code §§ 303.67(3)(b)-(c). She could refer the conduct report for further investigation. Wis. Adm. Code § DOC 303.67(3)(e). After completing this review, involving judgment and choice, Ware then was required to "divide all remaining conduct reports into major and minor offenses." Wis. Adm. Code § DOC 303.67(4).

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Santiago argues that both Zangl and Danner had a non-discretionary duty to look at the waiver form to see if there had been a proper waiver.[29] An evaluation of Santiago's waiver form required analysis and judgment. The box indicating Santiago waived his right to a formal due process hearing had been checked, then crossed out. Interpreting the resulting composite mark required judgment. Moreover, as Santiago states in his recitation of facts, "[Zangl] did not ask Santiago about the incomplete waiver form, or whether he intended to waive his right to a formal due process hearing. There is no rule or regulation requiring hearing officers to verify that an inmate has waived his due process rights before holding a waiver hearing." Thus, it can hardly be said that the law imposed a duty upon Zangl that was "absolute, certain and imperative."

As to Danner, we again reject Santiago's attempt to isolate the evaluation of his waiver form from Danner's

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[29] Santiago does not argue that Zangl had a non-discretionary duty to stop the waiver hearing even if, as the trial court found, Santiago voiced his objections to Zangl and requested a due process hearing. The State challenges that finding as clearly erroneous. We need not reach that issue.

responsibilities as appeal officer. Wisconsin Adm. Code § DOC 303.76(7)(b) requires appeal officers to "review all records and forms pertaining to the appeal and make his or her decision within 10 days following receipt of the request." A review of the entire record on appeal involves judgment. As with Ware, the Danner may have been required to exercise judgment or that he did so wrongly does not transform his duties from discretionary to ministerial.

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To: November 20, 1996

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You are hereby notified that the Court has entered the following order:

No. 95-0079 *Santiago, et al. v. Ware, et al.* L.C. #92CV3906

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-respondent-petitioner, Lydia Santiago, et al., and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

STATE OF WISCONSIN
CIRCUIT COURT, BRANCH VII
COUNTY OF DANE

JAIME SANTIAGO,

Plaintiff,

v. Case No. 92-CV-3906

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL and DENNIS DANNER,

Defendants.

JUDGMENT

This case was tried on September 20, 21, and 22, 1994 before the Dane County Circuit Court, Branch VII, Honorable Moria Krueger presiding. The parties waived trial by jury. The Court filed its Findings of Fact and Conclusions of Law pursuant to which it directs entry of the following judgment:

IT IS HEREBY ORDERED, DECLARED AND ADJUDGED as follows:

1. The plaintiff, Jaime Santiago, shall recover of the defendants, Kathleen Ware, Todd Zangl, and Dennis Danner, the sum of $10,000.00 as damages, for which the defendants are jointly and severally liable.

2. the plaintiff shall recovery of the defendant Todd Zangl an additional sum of $500.00 as damages.

3. The plaintiff shall recover of the defendants Todd Zangl and Dennis Danner, pursuant to 42 U.S.C. § 1988, the plaintiff's reasonable attorney fees and expenses in the amount of $69,988.00 for fees, and $4,506.74 for expenses, plus additional reasonable attorney fees and expenses necessarily incurred after October 1, 1994. The amounts awarded as costs pursuant to paragraph 4 of this Judgment shall be deducted from the amounts recovered pursuant to this paragraph 3.

4. The plaintiff shall recover of the defendants costs in the amount of $3,213.34 to be taxed by the Clerk of Court pursuant to sec. 814.10, Stats.

5. Defendants Zangl and Danner deprived the plaintiff, Jaime Santiago, of due process by denying plaintiff of a full due process hearing and by finding him guilty without some reliable evidence of guilt. Plaintiff's correctional record is to be expunged of the 10 day extension of his mandatory release date.

IT IS FURTHER ADJUDGED that:

A. The plaintiff, Jaime Santiago, is a resident of the State of Wisconsin and his address is Waupun Correctional Institution, 200 South Madison Street, P.O. Box 351, Waupun, Wisconsin 53963-0351.

B. The defendant, Kathleen Ware, is a resident of the State of Wisconsin and her business address is 819 North 6th Street, 7th Floor, Milwaukee, Wisconsin 53203.

C. The defendant, Todd Zangl, is a resident of the State of Wisconsin and his business address is 1673 South 9th Street, 2nd Floor, Milwaukee, Wisconsin 53204.

D. The defendant, Dennis Danner, is a resident of the State of Wisconsin and his business address is 1673 South 9th Street, Milwaukee, Wisconsin 53204.

Dated: November 17, 1994.

BY THE COURT:

/s/ Honorable Moria Krueger

STATE OF WISCONSIN
CIRCUIT COURT, BRANCH VII
COUNTY OF DANE

JAIME SANTIAGO,

Plaintiff,

v. Case No. 92-CV-3906

KATHLEEN WARE, WAYNE MIXDORF,
TODD ZANGL and DENNIS DANNER,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BACKGROUND

This case was tried to the Court on September 20 and 21, 1994 with closing arguments given on September 22, 1994.[1] This is the fifth written decision in this case. The Court concurs with defense counsel's statement, "There's been enough writing on this case." For that reason and in order to be able to produce a timely determination on the merits, the four previous decisions are adopted by reference. The legal determinations will not be repeated in this document.

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[1] The first day of trial took place at Waupun Correctional Institute in order to accommodate plaintiff's physical disabilities. While at the institution, a tour of the Health Services Unit, where Mr. Santiago was housed from June 20, 1992 to June 30, 1993, was conducted for the trial participants.

FINDINGS OF FACT[2]

1. Paragraphs 1-6 of Exhibit 14 (Proposed Stipulation of Facts) are accepted by the Court and adopted as its findings of fact.

2. On June 18, 1992 while residing at Plymouth Manor Nursing Home in Milwaukee, Wisconsin, Mr. Santiago had a disagreement with a cook at the nursing home. Shortly thereafter, Mr. Santiago telephoned the police who came to the nursing home in response, but were unable to substantiate any abuse.

3. These incidents were reported to the nursing home administration, to Jon Schubert, Plaintiff's CRC supervisor, and to Kathleen Ware, Mr. Schubert's supervisor.

4. On June 19, 1992 there was a meeting which included Ms. Joann Adams, the director of Plymouth Manor, Mr, Schubert, and Ms. Ware. Ms. Adams testified that she had made no decision concerning Mr, Santiago's continued residence at the facility prior to that meeting. Mr. Schubert testified that representatives of the nursing home administration began the meeting by stating that they were willing to give Mr. Santiago, "one more chance, provided certain criteria were met."[3] No evidence was presented as to what these criteria were, whether there was any effort to meet them, under whose control it was to meet these criteria, or what happened to that initial position, Ms.

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[2] These findings are all to a level of reasonable certainty based upon evidence that is clear, satisfactory, and convincing.

[3] Even though quotation marks are used, unless otherwise indicated, they represent only what my notes from the trial show.

Adams testified that DOC "really wanted to keep Jamie there." The nursing home decided at the conclusion of that meeting that Mr. Santiago could no longer remain a resident.

5. On June 29, 1992, Jon Schubert filled out a conduct report. To ascertain the facts, he *thinks* he relied on written reports from the cook and/or witnesses, but Joann Adams testified that none of the witnesses to the incident completed a written report. That testimony is found to be true. It is undisputed that Mr. Schubert interviewed neither the cook nor Mr. Santiago regarding what happened on June 18, 1992. All the information relied upon by Mr. Schubert was at the very least one level of hearsay, and perhaps even more removed from first-hand knowledge of the events forming the basis of the report.

6. In determining to charge plaintiff with a violation of rule 303.63 Jon Schubert relied on a recommendation of a correctional officer with whom he worked. Mr. Schubert did not ever determine which nursing home rules he believed Mr. Santiago violated. Mr. Schubert had no training as to how to fill out a conduct report.

7. After receiving the conduct report, Ms, Ware, acting as Security Director, checked the box indicating that this was a "Major Offense" per "HSS 303.67(3)" without ever looking at that section of the administrative code. She has had no training as to the responsibilities of security director. The determination that any of these charges come within §303.68(3) is incorrect.

8. After a brief stay at University Hospital, plaintiff was replaced at the infirmary (HSU) at WCI. He received the

"Adult Conduct Report" (Exhibit 1) filed against him on July 1, 1992.

9. On July 20, 1992, Todd Zangl, a Division of Intensive Sanctions Supervisor for the Department of Corrections was assigned to conduct a hearing on the allegations contained in the conduct report against Mr. Santiago. Mr. Zangl is not certain whether he was told that this was a hearing "on waiver" but he was informed that it had to be heard soon since the 21 day time limit was about to expire either that day or the next.

10. That same evening Mr. Zangl went to WCI to conduct the hearing. He admits that he did not carefully review Exhibit 3 (Waiver of Major Hearing) although it was part of his responsibility to do so. He testified that the form is incomplete, there being nothing filled in on the third box-line from the bottom confirming waiver, and the bottom box-line requiring the security director's decision and signature are also blank. Most significantly, Mr. Zangl missed the cross-out on the one box that was filled out concerning plaintiff 's agreeing to waive a full hearing.

11. Exhibit 12, the affidavit of Sgt. Alvin Krueger, who helped Mr. Santiago fill out the waiver form, establishes that plaintiff did not waive a major hearing. Mr. Zangl has no recollection of it, but Mr. Santiago is certain that he told Mr. Zangl that he was not waiving his hearing, that he wanted due process and an advocate. This position is confirmed by the affidavit signed and testified to by Holly Meier, a nurse brought into the hearing to "translate"[4]

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[4] The term "translating" is used imprecisely to describe utilization of another person who is familiar with Mr. Santiago's speech (which is almost totally incomprehensible to those of us who are not well acquainted with him) to listen to him and repeat *verbatim* what he has said.

what Mr. Santiago was saying. At the time of trial, Ms. Meier had absolutely no recollection of what was said at that hearing, but in March, 1993 she swore to her statement and believed it to be accurate that:

> Jamie Santiago stated to the hearing officer that he wanted an advocate and full due process rights, and I had to repeat this to the Hearing Officer.

COMMENTARY

The defense views this issue as one of credibility and cites numerous examples of plaintiff being less than truthful. (ie, his denial of any of the incidents contained in the record from Plymouth Manor). Technically. there is not a direct conflict between Mr. Santiago's version and Mr. Zangl's since Mr. Zangl's position is a lack of recollection. The inference that the defense would have me draw is that if such statements had been made, not only would Mr. Zangl remember them, he would also have acted upon them and not conducted a hearing on waiver. Even though I concur that Mr. Santiago is hardly a paradigm of candor, on this issue I find that he is reporting truthfully. That conclusion is premised on his testimony, the March., 1993 statement of Ms. Meier (whose disinterest in this case is almost palpable), the notations on the waiver form, and Sgt. Krueger's affidavit.

12. Jamie Santiago did not waive his rights to a full due process hearing or to be assisted by an advocate in defending himself against the charges contained in Conduct Report # 432241. He affirmatively asserted these rights both by the manner in which he completed the waiver form and by communicating his desires though the "translation" of Holly Meier.

13. Although Mr. Zangl did look at §303.63, he was unable to state what nursing home policies and procedures plaintiff was alleged to have violated. The hearing officer did write down a three page statement of Mr. Santiago's version of events.

14. Mr. Zangl found plaintiff guilty of violating rule 303.38 and rule 303.63 and not guilty of violating rule 303.16. He wrote the following as the "Reason for Decision" (Exhibit 2):

> I have read the conduct report and reviewed the information provided by Mr. Santiago, I find nothing to indicate that there were threats issued by Mr. Santiago, but I do find that his behavior was disruptive as outlined by the conduct report.

15. At trial, Mr. Zangl asserted that in reaching his decision, he relied on Mr. Santiago's statement and cited the following sections as supportive:

> A. "I noticed the hostility between both of us. That's when the aide, my aide put my lock on my chair and grabbed my hand and said, `Jamie, forget it, wait till the morning and we'll straighten this out.' The lock was on my chair. He grabbed the lock and my hand..."
> B. "The yelling was an interpretation of every individual. He [the cook] didn't understand me and I had to repeat at least three times the issue itself."
> C. "I did call the police..."

He also found support in plaintiff's statement's showing that Mr. Santiago was standing out of his chair.

16. Based on those findings, Mr. Zangl decided on the following disposition: "Ext. of M.R. for 10 days and refer to PRC."[5]

17. As a result of that referral, Mr. Santiago remained at WCI in the HSU until June 30s, 1993.

18. Plaintiff appealed these determinations by filing an appeal form (DOC-91). He listed as the reasons for his appeal:

> I am not guilty. My verbal statement which was copied down by the hearing officer explains what happened. My account of what happened was not even taken into consideration.

There is no mention of an improper waiver, lack of an advocate, or failure to provide due process.

19. Dennis Danner, is a Division of Intensive Sanctions (DIS) supervisor. He is defendant Zangl's supervisor and has known him for 13 years, defendant Ware for 10-12 years, and defendant Schubert for 3-4 years. Mr. Danner was assigned plaintiff's appeal, and he decided the appeal adversely to plaintiff, finding:

> Upon review of conduct report 432241 and the hearing decision, it is apparent that the the [sic] hearing officer did take into consideration Mr. Santiago's statement in making his decision. It is also apparent that Mr. Santiago's behavior created a risk of serious disruption and risk of injury to another person.

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[5] "M.R." = mandatory release; "PRC" = program review committee.

20. Mr. Danner said he had been given "some" training in the procedures required by Chapter 303. He believed there was no reason to question whether a waiver had been given, although he conceded that the form was incomplete. He did not know the basis for the information in the conduct report, and could not state which nursing home rule Mr. Santiago had violated in order to be guilty under §303.63. He agreed that it was his responsibility in the appeal to "independently evaluate" the record of Mr. Santiago's hearing.

COMMENTARY

Defendants maintain that Mr. Santiago's failure to raise his lack of waiver and his due process concerns constitutes a waiver of the right to rely on those grounds in the appeal This is undercut by Mr. Danner's statement of his obligation to review the entire record of the hearing before Mr. Zangl. Additionally, the United States Supreme Court has found "... the right to due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." Carey v. Piphus, 435 US 247, 266 (1968) The defendants cannot deprive an inmate of his due process rights, and then justify their actions based on the inmate's failure to use "magic words" in seeking redress. Mr. Santiago testified that although he has been the subject of many, many disciplinary reports and hearings, the appeal at issue here was his first appeal. It is curious that Mr. Danner felt that the first hearing and determinations were acceptable, yet he ordered that another hearing occur in February, 1993. (See finding of fact # 23).

21. Both defendants Zangl and Danner testified that being found guilty of a major violation can bring about serious

consequences in the PRC decision.[6] According to Mr. Danner, a referral on a major violation guilt finding can change an inmate's security classification, and "that is what happened to Mr. Santiago." He further stated that the PRC doesn't look at minor violations, and that if Mr. Santiago had been found not guilty, a PRC referral was not "likely" to occur. If, however, Plymouth Manor had discharged plaintiff a PRC would be "absolutely" necessary to discuss his future plan of treatment.[7] It is also clear that a disposition that directs a referral to PRC is not, in itself, punishment. It is not listed as a penalty in Chapter 303.

22. As a direct result of the findings of guilt and the disposition referring plaintiff to the PRC, his security classification was changed from minimum to maximum, he was terminated from CRC., and held at WCI until June 30, 1993. Although, a PRC review would have occurred based on plaintiff's discharge from the nursing home, the PRC review that did occur was as a result of the hearing before defendant Zangl and the results were based upon the findings made by defendant Zangl and confirmed by defendant Danner.

23. At the direction of Dennis Danner, another hearing on the same conduct report was held by Daniel Benzer on February 8, 1993. This time, Mr. Santiago was given an advocate and a full due process hearing at which Jon

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[6] It was learned at trial that the PRC does not make the final decision on these matters. It makes a recommendation to the classification chief who apparently follows that recommendation as a matter of course.

[7] Because of the reference to this testimony in Mr. Nick's closing argument and my failure to see my notation on this statement, I had my reporter prepare a "rough" transcript. What is reproduced herein is what Mr. Neely's notes show.

Schubert was the only witness. Mr. Benzer found Mr. Santiago not guilty of violating 303.63 because there was no proof of what rule of the nursing home he was alleged to have violated, but he did find him guilty of disruptive conduct, contrary to 303.28. In his reason for decision he stated that he based the guilty finding on, "He did admit to arguing with the cook which constitutes disruptive conduct. Written statement supports this charge." No such admission can be located. Mr. Benzer's written disposition was, "10 DAYS EXTENSION OF M.R."

24. Mr. Santiago testified that at the conclusion of the hearing with Mr. Zangl, he felt his rights had been violated by Mr. Zangl, that his freedom had been taken from him "for no reason," that he had "no voice in the matter." He was "very upset."

25. As a result of his termination from the CRC program and retention at WCI, Mr. Santiago testified (without contradiction) that he "deteriorated" by not having received proper treatment. Mr. Sid Smith, a nurse at WCI-HSU, could not bring himself to describe as "good," the care Mr. Santiago received on the unit.

26. The following are differences between conditions at

Plymouth Manor	WCI-HSU
See through, openable windows	Barred, painted-over closed windows
Mobility through-out facility, including outdoors	Restricted to ward
Personal items: T.V., VCR, radio books, clothes	Very limited items

Private telephone in room	Telephone in public hallway
Near family & friends	Distant from family & friends
Daily visitors	One or twice per month visits
Private bathroom	No toileting privacy
No guards	Constant guards
Home-cooked food	Institutional food[8]
Physical therapy	

27. Mr. Santiago suffered from depression by being placed at HSU. According to Sid Smith, plaintiff attempted to kill himself by slicing his throat, but he was not strong enough. Mr. Santiago said he was "devastated." My personal observation of HSU showed it to be Dickensian in its vintage and bleakness.

28. If Mr, Santiago had gone before the PRC because of discharge from Plymouth Manor but without two major rule violations on his record it is unlikely that his security classification would have changed. He would therefore have been eligible to continue on CRC and to be placed in another nursing home (which he was on June 30, 1993) or to reside in the home of one of a number of relatives, which his sister, Lydia Santiago, as

[8] Sid Smith testified that Mr. Santiago loves food "-what else can people in his condition have?"

well as Mr. Santiago, himself, testified he could, as a practical matter, have done.[9]

CONCLUSIONS OF LAW

Jamie Santiago's constitutional right to due process have been violated in contravention of 42 USC §1983 by defendant Zangl, acting under color of law, by virtue of his reckless disregard of plaintiffs failure to waive a full hearing, his desire for an advocate, as well as the failure to provide the advocate and hearing. Mr. Zangl recklessly disregarded plaintiff's rights by failing to determine the lack of notice of charge under §303.63 and by the failure to determine the requirements of that section, by finding plaintiff guilty of disruptive behavior on non-attributed evidence and by drawing improper inferences from Mr. Santiago's statement and failing to list in his written decision what portions of Mr. Santiago's statement supported his determination of guilt.

COMMENTARY

While it must be recognized that none of the defendants in this case is a lawyer, some of Mr. Zangl's explanations for his decision make no sense, legally or logically. For example, he seems almost to be straining to misunderstand the significance of Mr. Santiago's statement regarding having a telephone in his room. It clearly was made part of his statement to show that the report had to be wrong in indicating that he had to ask to use a telephone or give any explanation of whom he intended to call Similarly. the inference of guilt drawn by Mr. Zangl by reason of Mr. Santiago admitting that he was "standing" does not rationally flow from the fact; nor is such an inference justified from an admission of calling the police, Mr. Santiago was not admitting to

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[9] Defendants agree that many CRC placements, perhaps the majority, are to private homes.

yelling. He was stating that a determination of whether someone's voice meets that description is subjective - "an interpretation of every individual." Mr. Zangl ignored exculpatory portions of the statement such as the point about the telephone, Mr. Santiago explaining that he was being misunderstood by the cook and having to repeat his words, or more importantly, Mr. Santiago's statement that "I have no use in my hands." Mr. Santiago's statement that he "noticed hostility" between himself and the cook is far from an admission of disruptive behavior. At least in Mr. Santiago's version, the actions of the cook seem more disruptive than those of the plaintiff. (ie. calling Mr. Santiago a "mother fucker" and a "mental defect" and pushing him). Mr. Santiago's version of events was the only one based on first-hand knowledge. And finally, many of the allegations of Mr. Schubert's conduct report are conclusionary with no supporting facts -- ie. "intimidating manner," "being disruptive," "to ward him off."

2. Acting under color of law, Dennis Danner violated plaintiff's constitutional rights to due process in contravention of 42 USC § 1983 by virtue of his reckless disregard of his duty to "independently evaluate" the waiver form, the charge under §303.63, the designation of the violations as major under §303.68(3), the lack of attribution to "facts" contained in the conduct report, and his duty to evaluate the contents of plaintiff's statement to defendant Zangl.

3. These actions by defendants Zangl and Danner constitute an "abuse of power" as that term is defined in Wisconsin Jury Instruction, Civil 2151.

4. Defendants have failed in their burden of proof to show that these violations did not cause plaintiff's injury.

COMMENTARY

The second hearing of February 8, 1993 was based on the same conduct report containing the same initially erroneous designation of the offenses as "major." It also suffers from the same hearsay-upon-hearsay problems in the conduct report, Mr. Schubert who testified at the second hearing still hadn't talked to anyone present at the incident. The same defects regarding inferences to be drawn from Mr. Santiago's statement as described in the previous Commentary pertain to the second hearing.

One of the primary reasons Mr. Benzer gave for finding Mr. Santiago guilty of disruptive conduct was, "He did admit to arguing," but no such admission is contained in the statement written for Mr. Santiago by Mr. Zangl or in the inmate statement on Exhibit 6. Had the second hearing been based on proper evidence and inferences, it is equally likely that no rule violations would have been found. It is not possible to know whether the PRC would have changed Mr. Santiago's security classification had he only one major violation or if the violations had been properly classified initially. While there is no question but that the second hearing was procedurally "better" than the first, it still contained significant abridgments of Mr. Santiago's due process rights. It cannot be relied upon as proof that had Mr. Santiago been afforded the due process to which he was entitled, he would have suffered the same injury. The flaws in even the second hearing make such a conclusion too speculative.

5. Defendants Zangl and Danner recklessly breached their state law duties to provide plaintiff due process in the same aspects as determined in conclusions of law #1, 2, and 4. They have failed to prove that their violations of plaintiff's rights did not cause his injury.

6. Defendant Ware negligently and recklessly violated plaintiff 's due process right to have his alleged offenses properly charged and properly classified. She has also failed to prove that her conduct did not cause plaintiff's injury.

DAMAGES

7. As and for damages for the injury caused by defendant Zangl's violations of plaintiff's due process rights alone, without reference to the further damages suffered as a result of the PRC review, the Court awards $500.00 (FIVE HUNDRED DOLLARS). (See finding of fact # 24).

8. As and for damages for the injuries caused by the defendants' violations of plaintiff's substantive and procedural due process rights as described in findings of fact # 21, 22, 25, 26, 27, 28, the Court, awards $10,000.00 (TEN THOUSAND DOLLARS).

9. No punitive damages are awarded.[10]

FINDING ON REQUEST FOR DECLARATORY JUDGMENT

10. Defendants Zangl and Danner deprived Jamie Santiago of due process by denying plaintiff of a full due process

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[10] Given the findings regarding the conduct of the defendants and consequences deemed to have flowed from their actions, an award of punitive damages might seem called for. However, note is taken that none of these defendants seems to have been adequately trained for the functions they were asked to perform. Certainly no malice can be found. From observing them on the stand, I cannot say that they were smugly defending their actions or anything but concerned by this scrutiny of their procedures. See, "Comment" to Wis. JI Civil 1707.

hearing and by finding him guilty without some reliable evidence of guilt. Plaintiff's correctional record is to be expunged of the 10 day extension of his mandatory release date.

MISCELLANEOUS

Counsel for plaintiff is to draft a judgment consistent with these findings and conclusions and is to present this to opposing counsel for approval as to form within 5 working days of receipt. This document, plus any post-decision motions, are to filed with the Court no more than 30 days from the date of this decision.

Dated this 26th day of September, 1994 at Madison, Wisconsin.

BY THE COURT:

/s/ Honorable Moria Krueger, Judge

cc: Attorneys Lawrence Bensky & Melanie Cohen
Assistant Attorney General Stephen J. Nicks

STATE OF WISCONSIN
CIRCUIT COURT, BRANCH VII
COUNTY OF DANE

JAIME SANTIAGO,

Plaintiff Pro Se,

v. Case No. 92-CV-3906

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL and DENNIS DANNER,

Defendants.

JUDGMENT

BACKGROUND

Before the court are plaintiff's and defendants' cross-motions for summary judgment pursuant to section 802.08, Wis. Stats. The plaintiff brings this complaint under 42 U.S.C. section 1983 and state law alleging violations of his state and federal Constitutional rights in conjunction with a prison disciplinary hearing and subsequent removal from community placement. He requests the following relief: (1) return to community based placement; (2) trial by jury on all issues triable; (3) compensatory damages in the amount of $100.00 for each day that he spends not in the CRC program as a result of defendant's actions; (4) injunctive relief expunging the conduct report and all collateral consequences; and (5) all additional relief deemed appropriate.

FACTS

Plaintiff is currently an inmate at the Waupun Correctional Institution (WCI). Defendant Mixdorf was the warden of the Community Residential Confinement (CRC) program at the time of the incident in question; defendant Danner was superintendent of Marshall E. Sherrer Correctional Center; defendant Ware was the security direction of CRC; and defendant Zangl was an employee of the Division of Intensive Sanctions.

At the time of the incident, plaintiff was classified by the Program Review Committee (PRC) as minimum security/ community residential confinement (CRC) and was residing in a public nursing home where he received skilled nursing care and physical and occupational therapy. Plaintiff suffered from progressive amyotrophic lateral sclerosis. He was severely limited in his ability to ambulate, use his arms, or communicate verbally or in writing. Plaintiff was in a wheelchair.

On June 18, 1992, plaintiff was summarily transferred from the nursing home to WCI and placed in temporary lockup status (TLU) pending an investigation into charges of misconduct arising out of a dispute with a cook at the nursing home.

On July 1, 1992, Mr. Santiago was served with a DOC Conduct Report charging him with violating DOC regulations section 303.63 (threats), section 303.28 (disruptive conduct), and section 303.63 (violation of institutional policies and procedures). Defendant Kathleen Ware, the CRC Security Director, designated the charges as a "major offense", giving as the reason for this designation a violation of DOC section 303.68(3). Also on July 1, 1992, plaintiff was given his Notice of Major Disciplinary Hearing Rights and Waiver of Hearing

Form. On page two of that form is a section in which an inmate may waive his formal hearing by checking all four boxes. All four boxes have markings in them, Sergeant Alvin Krueger who filled out the form for plaintiff stated that a wavier was not intended and that the markings in the last box were meant to cross out an erroneous notation. A second group of boxes needed to validate the waiver indications above was left blank.[1]

On July 20, 1992, defendant Zangl conducted a "waiver" disciplinary hearing on the charges. Since plaintiff could not be understood by Zangl, a nurse, Holly Meier, was called into the hearing after it had begun to interpret the plaintiff's statements to Zangl. Meier stated in her first affidavit that plaintiff stated to the hearing officer that he wanted an advocate and full due process rights, and that she repeated this to the hearing officer. (First Meier Affidavit, 3/31/93.) In her second affidavit, Meier stated that she remembers the words "due process" being used at some point during the hearing. However, her best memory is that this came up at the end of the hearing when plaintiff was being informed of his appeal rights. (Second Meier Affidavit, 4/7/93.) Plaintiff contends that he protested the waiver hearing. Defendant Zangl contends that plaintiff never once objected to the fact that the hearing was not a full due process hearing.

The evidence presented at the hearing consisted of the written conduct report signed by Mr. Jon Schubert. (Adult Conduct Report # 432241.) Mr. Schubert is not identified other than by name in any of the pleadings or supplemental materials. The record lacks information pertaining to how Schubert came to have knowledge of the incident or to write the conduct report.

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[1] The second group of boxes reads, "I have checked the appropriate boxes above and my signature means that: [box] I waive a formal due process (major) hearing or [box] I waive time limits or [box] I waive both formal due process (major) hearing and time limits."

Based upon Schubert's written conduct report, Zangl found plaintiff guilty of violating DOC section 303.28 (disruptive conduct) and section 303.63 (policies and procedures), but not guilty of threats. Plaintiff was given a 10-day extension of his mandatory release date and his CRC status was ordered to be reevaluated.

The following day, July 21, 1992, the CRC Committee terminated plaintiff from the community program but recommended that he "override to a medium [security facility] based on his physical condition." (Report of CRC Committee.) Plaintiff was not notified about the date or time of the meeting. He was not contacted prior to the PRC reevaluation meeting by a staff member. Likewise, he was not informed that he had the option to attend the reevaluation meeting.[2]

On July 24, 1992, plaintiff sought review of the disciplinary decision by filing an Appeal of Adjustment Committee or Hearing Officer's Decision. In that appeal, he stated the following reason for appealing the committee's finding of guilt:

> I'm not guilty. My verbal statement which was copied down by hearing officer explains what happened. My account of what happened was not even taken into consideration.

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[2] Wis. Admin. Code, HHS, section 302.19: Program Review Procedure.

(1) Before an inmate's security classification, assignment to an institution or program assignment is reviewed by the PRC, a staff member shall interview the inmates and inform the inmate orally of the approximate date of the review, the criteria for the review, the facts to be considered at the review and the fact that the inmate has the option to appear before the PRC. The inmate shall also be informed that if he ... refuses to attend the review ... the review may be conducted without the inmate being present.

Plaintiff did not raise the issue of the hearing being held on waiver in his appeal. On September 1, 1992, defendant Danner affirmed Zangl's finding of guilt.

On September 8, 1992, plaintiff commenced a 42 U.S.C. section 1983 action against defendants Zangl, Danner, Ware, and Mixdorf, and a negligence claim against defendant Ware.

After the Department of Corrections became aware of the affidavit of Sgt. Krueger, stating that he had inadvertently checked the waiver box on the Notice of Hearing form and had then tried to cross out the notation, it voided the initial determination. On February 8, 1993, Mr. Daniel Benzer, a Social Services Supervisor, conducted a second disciplinary hearing to clear up mistakes of the first hearing. (Benzer Affidavit at page 1.) At the second hearing, Mr. Steve Boehm acted as plaintiffs advocate. Mr. Jon Schubert, who wrote the initial conduct report, testified in person, Benzer found Santiago guilty of disruptive conduct because plaintiff admitted to arguing with the cook. Plaintiff was found not guilty of violation 303.16 (threats) and section 303.63 (policies and procedures) because there was no evidence that he threatened anyone and there was no indication of what policies and procedures he had violated. Plaintiff was penalized by affirming the 10-day extension of his prison release date. (Benzer Affidavit.) Although no mention was made about the community-based program, he was not returned to community-based placement.

STANDARD OF REVIEW

This court applies the standards set forth in sec. 802.08(2), Stats. and the two-step procedure described in *Green Spring Farms VI Kersten* when evaluating the propriety of a motion for summary judgment. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). First, the court

examines the pleadings to determine if a claim for relief has been stated. Second, if a claim for relief has been stated, the court determines if there are any triable issues of material f act which preclude the grant of summary judgment. *Id.* at 314-315, 401 N.W.2d 816. If there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, summary judgment should be granted. Section 802.08(2), Stats.

I. THE 42 U.S.C. SECTION 1983 CLAIM

In deciding whether a summary judgment motion should be granted, the court must first examine the pleadings to determine whether the plaintiff has stated a claim which entitles him to relief and whether the defendants' answer raises a defense to the plaintiffs claim. *Schroeder v. Schoessow,* 103 Wis. 2d 380, 385, 309 N,W.2d 10, 13 (Ct. App, 1982). At this stage, it matters not whether the plaintiff can prove the allegations to be true, but that the facts, if accepted as true, give rise to a cause of action. *Rendler v. Markos*, 154 Wis. 2d 420, 423, 453 N.W.2d 202, 204 (1990).

Pursuant to a section 1983 claim, plaintiff must allege:

1) that the conduct complained of was committed by a person acting under color or state law;

2) that the actions deprived him of constitutionally protected property or liberty interests;

3) that the alleged deprivation occurred without due process of law, *Parratt v. Taylor*, 451 U.S, 535f 101 S,Ct, at 1913 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S,Ct. 662 (1986).

Plaintiff's pleadings provide all elements of a prima facie violation of section 1983. He alleges that defendants Zangl, Danner, and Mixdorf were all state employees acting under color of state law when the alleged violations occurred. Furthermore, he alleges that their actions deprived him of liberty interests when he was removed from community-based placement and when his mandatory release date was extended by ten days. Finally, he alleges that the deprivations occurred without due process since he was deprived of the full due process hearing guaranteed under section 303.76(3), Wis. Admin. Code, and under the Constitution of the United States. He allegations include:

1) He was not given notice of the hearing until he was summoned to it. Consequently, he was unable to prepare a defense or call witnesses.

2) He did not have effective counsel.

3) At the hearing, he protested the waiver of a full due process hearing. He was unable to make himself understood to defendant Zangl, so a nurse, Holly Meier, was called into the hearing to interpret what he was saying. Plaintiff also protested the waiver of a full due process hearing to Meier. These acts gave Zangl effective notice that plaintiff did not intend to waive his full due process rights. Additionally, the absence of any markings in the second set of waiver boxes indicated that he did not intend a waiver. Since Zangl was given effective notice of plaintiff's desire to not waive a full due process hearing, he acted in knowing violation of plaintiff's constitutional rights when he went ahead with the waiver hearing.

4) The determination of his guilt was completely without a factual foundation, hence a violation of substantive due

process and unconstitutional per se. Plaintiff charges that the Conduct Report, the only evidence presented at the hearing, has no factual foundation. Additionally, he charges that Schubert, who wrote the report, was not present at the incident and was not even an employee of the nursing home. Therefore, the report is inadmissible hearsay evidence. Consequently, the determination of his guilt must be overturned on the basis of a lack of "some evidence." Since defendants Zangl and Danner should have known that some evidence is needed to make and affirm a finding of guilt, they are liable under 42 U.S.C. 1983 for violation of his substantive due process rights.

5) The PRC committee failed to notify him about the time and place of his security classification reevaluation in violation of DOC administrative regulations.

6) The second hearing did not "cure" the violations of the first hearing since he was not given the opportunity to call witnesses; the finding of guilt was again without a factual basis because the evidence failed to meet the "some evidence" standard; and the disposition of the hearing resulted in an incomplete remedy since he has not been returned to a nursing home and since his mandatory release date is still extended by ten days.

Defendant Zangl does not dispute that in his capacity as a state employee acting under color of state law, he was involved in acts that resulted in plaintiffs removal from community-based placement and the extension of his mandatory release date by ten days. He and the other defendants base their defense and subsequent motion for summary judgment on the following defenses.

1) Plaintiff did not state a claim under section 1983. He waived his claim to a full due process hearing based upon the violation of his due process rights by not raising the issue at the disciplinary hearing or the administrative appeal.

2) Defendant Zanglls failure to specifically set forth his reasons for the finding of guilt as to 303.63 (policies and procedures) and defendant Danner's affirmative of that finding are harmless errors since the state provided adequate remedy when it conducted the second hearing.

3) Defendants are entitled to qualified immunity because any mistakes they may have made were "mistaken judgments."

4) Defendants are entitled to qualified immunity because any variance between their actions and due process requirements were random and unauthorized and because the state provided adequate postdeprivation remedies.

5) Defendants Mixdorf and Danner are entitled to immunity on the grounds that they had no direct involvement in any of the acts alleged. Hence, they may not be held liable for a claim under section 1983.

A. VIOLATIONS OF PROCEDURAL DUE PROCESS

Plaintiff argues that his procedural due process rights were violated in four ways. First, he did not have adequate notice of the hearing so that he could prepare a defense or call witnesses. Second, since it is the custom at WCI to assign a staff advocate to inmates facing a major offense disciplinary hearing, he was waiting for an advocate to be assigned to him and to contact him when he was abruptly and without notice called to his hearing.

Consequently, he was unable to prepare a defense including obtaining the written statements of witnesses. Third, he did not have the assistance of a staff advocate in either preparing for or during a disciplinary hearing for a serious offense. Finally, defendant Zangl had effective notice of plaintiff's intent to not waiver a full due process hearing since both the Notice Form and plaintiffs and nurse Meier's verbal communications put Zangl on effective notice.

1. Adequate Notice.

Plaintiff claims that he did not have adequate notice of his hearing since he was not given a date and the hearing officer, defendant Zangl, arrived unannounced to hold plaintiff's hearing. Wisconsin Adm. Code, sec, HSS 303.76(3), provides that a due process hearing for a major violation shall be held no sooner than two days nor later than twenty-one days after the inmate receives a copy of the Conduct Report and Hearing Notice. Wisconsin Adm. Code, sec. HSS 303.81(9), provides that "[t]he hearing officer shall prepare notice of the hearing and give it to the accused, the advocate (if any) the committee and all witnesses...." The state has no responsibility to give notice of date, time and place of the disciplinary hearing. *Saenz v. Murphy*, 153 Wis. 2d 660, 674, 451 N.W.2d 780 (1989). Plaintiff was given proper notice of the hearing and the hearing was held in the designated period of time. Hence, plaintiff's procedural due process rights were not violated on account of improper notice.

2. Adequacy of Notice for Purposes of Plaintiff" s Opportunity to Prepare A Defense

Plaintiff argues that he was given insufficient time and assistance to prepare a defense before he was summoned to the first hearing on July 20, 1992. He argues that since it was the custom at WCI for an advocate to be assigned to and to contact

each inmate facing a major offense disciplinary hearing, he was waiting for an advocate to be assigned to him and to contact him in order to help him prepare a defense when he was summoned to his hearing. Thus, he was given insufficient notice in light of the fact that he had no advocate to help him prepare a defense before the hearing took place.

Minimum procedural protections for prisoners facing major misconduct disciplinary penalties are not met where the prisoner is given so little notice of his hearing that he cannot prepare his case or obtain necessary evidence. *Sturdevant v. Haferman*, 798 F.Supp. 536 (E.D. Wis. 1992). Citing *Wolf v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974), the court held that the due process protections prisoners are entitled to when facing the loss of substantial liberty interests are not met unless the prisoner is given sufficient time and notice to prepare his case by obtaining the written statements of witnesses or other documentary evidence. Id.

There is no dispute that plaintiff was not contacted by a staff advocate before his unscheduled hearing. It is difficult to see how he could have, under the circumstances of his temporary lock-up status, prepared a defense by obtaining the statements of witnesses without the help of an advocate. The location of the witnesses outside the prison made the task of obtaining the written statements of witnesses particularly difficult, Hence, under the standard set forth in Wolff, plaintiff was not afforded adequate notice of his disciplinary hearing.

3. Waiver of Full Due Process Hearing

In light of Sgt., Krueger's affidavit, there is no dispute that plaintiff did not intend to waive a full due process hearing. However, there is a factual dispute over whether plaintiffs

attempts to communicate his intent were effective notice of his intent to not waive his rights.

For defendant Zangl to ward off summary judgment on this issue, he must show that plaintiff failed to effectively protest the waiver hearing. Alternatively, Zangl may show that his decision to hold the hearing despite the effective protest of plaintiff was a case of "mistaken judgment".

Government officials are immune from liability if, under all the facts and circumstances at the time they acted, they acted in an objectively reasonable manner but were mistaken. *Hunter v. Bryant*, 112 S.Ct. 5341, 537 (1991). The court's inquiry is "whether the [government's] agent acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable interpretation of the events can be constructed ... after the fact." *Hunter* at 534. Mistaken judgment is a defense available to all but the grossly incompetent. The state of mind of the official is irrelevant. However, the official may not claim the defense if he acted in a manner that, when examined objectively, was in deliberate indifference to the deprivation of plaintiff's constitutional rights.

The decision of whether the acts of an official were a case of "mistaken judgment" is for the court, not the jury, since it results in immunity from suit. *Hunter* at 534. "Because the entitlement is an immunity from suit rather than a mere defense to liability, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), the question of immunity should be resolved at the earliest possible stage in litigation." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

For defendant Zangl to be entitled to the defense of mistaken judgment, the court must find that his decision to hold a waiver hearing despite the known contrary intention of plaintiff

was a reasonable one. Under the facts in this case, the court cannot say that Zangl's choice to hold a waiver hearing despite the effective protest of plaintiff was a reasonable one. As a result, Zangl is not entitled to qualified immunity if the trier of fact determines that plaintiff made effective protest of the waiver of his full due process rights.

4. Right to An Advocate

Two circumstances prevented plaintiff from enjoying the right to an advocate before and at his first hearing. First, he was called to the hearing without first having been contacted by counsel, as is the usual practice at WCI. Second, the first hearing was a waiver hearing; consequently, no advocate was provided.

There can be no dispute that he was entitled to an advocate and to the opportunity to call witnesses or present the written statements of witnesses. *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974). In *Wolff*, the Court held that when an inmate has a liberty interest of "real substance" at issue, he has a constitutional right to pre-deprivation procedures including, under some circumstances, an advocate. Here, the plaintiff had two liberty interests of real substance in jeopardy: plaintiff's removal from nursing home placement and the 10-day extension of his mandatory release date. Hence, plaintiff was entitled to a staff advocate when individuals acting under color of law were acting to take those liberty interests away. The fact that plaintiff was afforded an advocate at the second hearing is not material since the liberty interests removed as a result of the first hearing have not been returned.

In sum, plaintiff's due process rights were violated in that he was not afforded an adequate opportunity to prepare a defense. Additionally, he was not afforded counsel in either the preparatory or hearing phase. Finally, his attempts to make an

effective protest of the waiver hearing were either ineffective or deliberately ignored. In any case, he was not given a full due process hearing which is his right as a matter of law.

B. SUBSTANTIVE DUE PROCESS

Plaintiff argues that it is a substantive violation of his constitutional right to due process to find him guilty without any evidence to support such a finding. Regardless of the procedures employed, a state cannot find a person guilty of a crime without any evidence, no matter how much procedural due process is afforded. Consequently, Zangl's finding of guilt and Danner's review of the conduct report and the proceedings were in violation of plaintiff's due process rights because the findings of each were without any admissible evidentiary basis.

Under *Superintendent v. Hill*, 472 U.S. 445, 105 S.Ct. 2768 (1985), a prison disciplinary board may not deprive a prison inmate of a protected liberty interest without a hearing determination based supported by "some evidence" in the record. In *Hill*, the evidence before the disciplinary board consisted of testimony from a prison guard and copies of his written report. The Court held this evidence to be sufficient to meet the "some evidence" requirements imposed by the due process clause despite contrary evidence. *Id.*

Under the "some evidence" standard enunciated in *Hill*, the court is barred from assessing the relative weight of the evidence. once the reviewing court has found some evidence that it is reliable, its substantive due process inquiry ends. It may not look further to see whether other evidence in the record may have suggested an opposite conclusion. *Culbert . Young*, 834 F.2d 642, 630-31 (7th Cir., 1987), *cert. denied*, 108 S.Ct. 1296 (1988). The requirements of due process are satisfied if some evidence

supports the decision by the prison disciplinary board. *Culbert, supra.*

In contrast to the factual circumstances in *Hill*, in *Cato v. Rushen*, 824 F,2d 703, 705 (9th Cir., 1987), a hearsay report of a confidential informant was not sufficient to meet the "some evidence" requirement. In *Cato*, since the only evidence was the second-hand report by an unnamed person, the findings of guilt resulting from a prison disciplinary hearing could not be sustained. *Id.*

In this case, the written conduct report and the oral testimony by a named but unidentified Mr. Jon Schubert is insufficient evidence to meet the "some evidence" standard. According to plaintiff, Schubert was not present at the time of the incident. Additionally, plaintiff claims that Schubert was not even employed by the nursing home. Defendants have not produced any documentation showing the basis for Mr. Schubert's report. Hence it fails to meet the "some evidence" standard required for substantive due process. Since Mr. Schubert's report, written at the first hearing and presented orally at the second hearing, is the only evidence given to sustain plaintiff's finding of guilt, that finding may not be upheld. Plaintiff's admission, at the second hearing, that he argued with the cook is insufficient to warrant the penalties imposed by the disciplinary board.

C. Failure Of Plaintiff To Raise The Waiver Issue On Administrative Appeal

Defendants Zangl and Danner argue that plaintiff's section 1983 claim is inadequate since plaintiff failed to raise the issue of the waiver hearing on administrative appeal. Citing *Saenz v. Murph*, 162 Wis. 2d 54, 63-64, 469 N.W.2d 611 (1991), they contend that plaintiff's failure to raise the issue waived his right to raise

the issue on appeal. Consequently, plaintiff is prevented from bringing a claim because he failed to make a timely objection to the alleged violations of his due process rights.

A state court may not require a complainant to exhaust state administrative remedies before he is entitled to bring a section 1983 action in state court unless the complainant falls under a clear exception to the "no exhaustion" rule. *Felder v. Casey*, 487 U.S. 1341 (1988). In *Felder II*, the Court struck down a Wisconsin notice requirement for section 1983 actions against state officials. The notice requirement operated, in part, as an exhaustion requirement by forcing claimants to seek satisfaction in the first instance from the governmental defendants. The Court held that claimants may not be forced to seek satisfaction in the first instance from the very governmental defendants subject to section 1983 actions. Congress never intended that those injured by governmental wrongdoers should be required, as a condition of recovery, to exhaust their claims to the government responsible for their injuries before bringing them under section 1983. *Id.*

In addition, plaintiff does not fall within the two "no-exhaustion" exceptions for section 1983 claims. In *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1973), the Court identified two exceptions to the no-exhaust rule for section 1983 actions. First, the claimant may be required to exhaust administrative and state remedies if there is a federal statutory requirement mandating administrative exhaustion before actions can be brought. Second, adult prisoners are an exception to the no-exhaustion rule if the adult prison inmate is seeking restoration of good time. In that case, the judgment for plaintiff would act as collateral estoppel in a later habeas corpus proceeding seeking restoration of good time, *Viens v. Daniels*, 871 F.2d 1328 (7th Cir., 1989). However, if in addition to the revocation of good time, the outcome of the prison disciplinary

hearing also imposes substantial discipline on the prisoner or substantially and negatively changes his conditions-of-confinement, exhaustion of state remedies may not be a prerequisite. *Viens, supra.*

In applying the rules of *Felder* and *Viens* to this case, the court concludes that plaintiff Santiago may not be precluded from bringing an action under section 1983 for failure to raise the issue of the waiver hearing on appeal within the prison system. While part of his penalty included the revocation of good time, this penalty does not place him within the federal habeas corpus exception. The additional ruling that his community placement should be reviewed and plaintiff's subsequent termination from the program was a conditions-of-confinement penalty that places this action within the "no-exhaustion" rule.

The rule of *Saenz v. Murphy* is inapplicable in this case. In *Saenz*, the plaintiff brought suit in certiorari, not under section 1983. *Saenz*, supra. Hence, in that case the prisoner's failure to raise the issue on administrative appeal prevented him from raising it in state court. In this case, the exhaustion rule is governed by section 1983 law.

D. HARMLESS ERROR

Defendants contend that they are entitled to qualified immunity as to any acts in violation of either substantive due process or procedural due process because any mistakes were rectified by the second hearing. Hence, any mistakes were harmless error.

The harmless error defense may be disposed of summarily. Under sec. HSS 303.87, Wis. Administrative Code, a harmless error is defined as follows:

> If a procedural requirement .... is not adhered to by staff, the error may be deemed harmless and disregarded if it does not substantially affect the rights of the inmate. Rights are substantially affected when a variance from a requirement prejudices a fair proceeding involving an inmate.

While it is true that a second hearing was held to rectify any mistakes made at the first hearing, the effects of the first hearing resulted, and continue to result in the deprivation of substantial liberty interests for plaintiff. Plaintiff continues to be an inmate in WCI. His community-placement has not been returned. Consequently, mistakes made in either the procedural or substantive due process owed plaintiff may not, under these facts and circumstances, be designated harmless errors.

E. THE "RANDOM AND UNAUTHORIZED" DEFENSE

The "random and unauthorized" defense applies: 1) when the government employees actions were so unpredictable and unauthorized that a pre-deprivation hearing was impracticable, and 2) when in addition, state certiorari review provides an inadequate post-deprivation remedy, *Parratt v. Taylor*, 451 U.S. 537, 101 S. Ct. 1908 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986). *Hudson v. Taylor*, 468 U.S. 517, 104 S. Ct. 3194 (1984). In *Parratt*, prison employees were granted qualified immunity when they negligently lost a prisoner's mail-order hobby kit. The court held that since the employee's acts were so random that governmental officials could not reasonably have enacted predeprivation preventive measures and since a complete remedy was available, the officials were entitled to qualified immunity. *Parratt, supra*. On the other hand, in *Hudson*, the Court held that a prison guard was not entitled to qualified immunity on the

grounds of random and unauthorized acts when he deliberately destroyed a prisoner's personal property during a cell shakedown. In *Hudson*, the guard was denied qualified immunity because, although his acts were random and unauthorized, there was no adequate post-deprivation remedy. The state could not replace the lost items. *Hudson, supra.*

In this case, although the acts resulting in the denial of plaintiff's due process rights may have been random and unauthorized, state administrative review failed to provide an adequate post-deprivation remedy. The penalties imposed after the first hearing continue to be in effect. Plaintiff has not been returned to nursing home placement. The ten-day extension of plaintiff's mandatory release date is still in place. Hence, defendant Zangl's request for qualified immunity based on a random and unauthorized defense must be denied.

F. THE PERSONAL INVOLVEMENT DEFENSE

Defendants Mixdorf and Danner argue that they are entitled to immunity from suit on the grounds that they were not personally involved in any acts that would incur liability under 42 U.S.C. section 1983. Warden Mixdorf's only involvement was as Warden of WCI during the time the incident occurred. Defendant Danner handled plaintiff's administrative appeal.

Liability under section 1983 requires personal involvement by the defendants, *Wolf-Lillie v. Songuist*, 699 F.2d 864, 869 (7th Cir. 1983). Under *Wolff-Lillie*, governmental supervisors may no be held liable for the actions of their subordinates since section 1983 claims may not be predicated upon a *respondeat superior* theory. *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S. Ct. 445, 453 (1981). Failure of a supervisory official to supervise or control subordinates is not actionable absent a showing that the official either encouraged

the specific incident of misconduct or in some way directly participated in it. *Lenard v. Argento*, 699 F.2d 874, 885 (7th Cir.), *cert. denied*, 464 U.S, 815 (1983). Inaction by a supervisor may be a basis for liability under section 1983 only when there is an extremely high degree of culpability that reaches the level of gross negligence or deliberate indifference to the deprivation of a plaintiff's constitutional rights. *Id.* Absent allegations of the defendant's personal involvement or deliberate indifference to plaintiff's rights, the complaint cannot sustain liability against the him.

Plaintiff failed to allege specific acts showing the personal involvement of Warden Mixdorf or acts showing Mixdorf's deliberate indifference to the violation of plaintiff's constitutional rights. Consequently, summary judgment must be granted to defendant Mixdorf as a matter of law.

However, the court cannot grant defendant Danner summary judgment on the issue of lack of personal involvement. His involvement in upholding the findings of the first hearing despite evidence of plaintiffs intent to protest the procedures and findings of that hearing contains a dispute of material fact concerning his liability under section 1983.

II. STATE LAW NEGLIGENCE CLAIM

Pursuant to plaintiff's claim in negligence based on state law, plaintiff claims that defendant Ware was negligent in the performance of her nondiscretionary, ministerial duties when she selected the category of "major offense" for the alleged acts. Defendant responded by claiminq immunity since government employees are entitled to immunity in the exercise of their discretionary acts. Additionally, she argues that since selecting a category for offenses is a discretionary act, she is entitled to immunity.

State employees are generally immune from tort liability. *Lister v. Board of Regents*, 72 Wis. 2d 282, 300, 240 N.W.2d 610 (1976). A complaint fails to state a claim unless it alleges facts warranting an exception to the general rule. Immunity will apply unless the duty involved is ministerial and is performed negligently, or 2) the act was malicious, willful, and intentional. *C.L. v. Olson*, 143 Wis. 2d at 725, 422 N.W.2d 614 (1988).

Acts are ministerial in two ways. First, they may be ministerial if a state statute or regulation describes the duty and the exact and specific way the duty is to be performed. The precise when and how must be set out. *Lister* at 301. "A public officials duty is ministerial when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Lister* at 301. Second, acts are ministerial if they involve dangers that are "obvious" to the government employee but "hidden" and "grave" to the plaintiff, *Cords v. Anderson*, 80 Wis. 2d 525, 542, 259 N.W.2d 672 (1977).

It is clear that the act of selecting a category of offenses does not become ministerial because it presents an obvious danger to the employee that is hidden and grave to an inmate. It is less clear whether the act in question is discretionary or ministerial based on the first set of criteria. The decision of setting forth categories of offenses is described in detail in Wis. Admin. Code, HHS section 303.67. The when and how are specifically set forth. However, the court finds that the act of selecting offense categories based on a unique set of facts and circumstances involves judgment and discretion. Hence, the act is discretionary, not ministerial. Consequently, defendant Ware

is entitled to immunity from tort liability for her selection of the category of offense.

V. CONCLUSIONS

Plaintiff Santiago's motion for summary judgment as to the 42 U.S.C. section 1983 claim in granted in part. The court finds that plaintiff's constitutional right to due process was violated both procedurally and substantively at the first hearing. The second hearing, conducted after plaintiff's section 1983 claim was brought, was an incomplete cure for the effects of the first hearing. Additionally, when DOC officials reevaluated plaintiff's security status following the first disciplinary hearing, they failed to follow DOC administrative procedures under Wis. Admin. Code., HHS, sections 302.19 and 302.20.

There remains a disputed issue of material fact as to whether defendant Zangl was put on notice of plaintiff's intent to not waive his due process rights. Plaintiff claims that he personally informed defendant Zangl that he did not intend to waive his du6 process rights. Additionally, plaintiff claims that he informed nurse Meier about his intent, in the presence of defendant Zangl, and plaintiff ask her to communicate that intent to defendant Zangl. For his part, defendant Zangl claims that the plaintiff did not once protest the waiver hearing. For this reason, plaintiff's and defendant Zangl's motions for summary judgment on the issue of defendant Zangl's liability under section 1983 are denied. Plaintiff is entitled to a jury trial on this issue.

Defendant Mixdorf's motion for summary judgment is granted on the ground that he was not personally involved in the acts alleged in this claim. Defendant Ware's motion for summary judgment is granted on the ground that she is entitled to immunity from negligence claims since the act of selecting offense categories is a discretionary function. Defendant

Danner's motion for summary judgment is granted on the ground of qualified immunity for mistaken judgment. Defendant Danner's affirmation of plaintiff's disciplinary hearing disposition, although perhaps not the most reasonable action, was nevertheless an objectively reasonable one for an individual acting in defendant Danner's quasi-judicial role.

There remains the issue of appropriate remedies under 42 U.S. C. section 1983. The parties have not really addressed the issue of whether the involuntary transfer of a state prisoner from community placement in a nursing home to a maximum security facility implicates a liberty interest that is protected by the Due Process Clause. In particular, the parties are to brief the court as to whether *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254 (1980), and its progeny, and *Wolff v. McDonald*, 418 U.S. 558 (1974), or the line of cases that hold that prisoners have no liberty interest in administrative transfer between facilities, *Olim v. Wakinekona*, 461 U.S. 238, 103 S. Ct. 1741 (1983); *Montanye v. Haymes*, 427 U.S. 236 (1976); and *Meachum v. Fana*, 427 U.S. 215 (1976), should control in this case. In addition, the parties should detail their positions on other remedies and the legal bases for these remedies. Legal arguments should be presented by both sides, in writing, by September 10, 1993.

Dated at Madison, Wisconsin this 9th day of August, 1993.

BY THE COURT:

Hon. Moria Krueger, Judge
Circuit Court, Branch, 92 CV 3906

cc: Jaime Santiago
Stephen Nicks

STATE OF WISCONSIN
CIRCUIT COURT, BRANCH VII
COUNTY OF DANE

JAIME SANTIAGO,

Plaintiff,

v. Case No. 92-CV-3906

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL and DENNIS DANNER,

Defendants.

MEMORANDUM DECISION AND ORDER

BACKGROUND

Before the court is defendants' motion for reconsideration of this court's Memorandum Decision, dated August 9, 1993, addressing plaintiff's and defendants' cross-motions for summary judgment. Plaintiff commenced this action against defendants on September 3, 1992, alleging state law and 42 U.S.C §1983 violations. Specifically, plaintiff alleges that his constitutional rights to substantive and procedural due process were violated by defendants in the course of his disciplinary hearing. Further, plaintiff alleges that defendants Ware and Zangl were negligent in the performance of their respective duties in the course of the disciplinary hearing. Plaintiff filed a motion for summary judgment on these claims on December 28, 1992.

On February 3, 1993, defendants filed a cross-motion for summary judgment. Defendants contend that plaintiffs' 42 U.S.C §1983 claims should be dismissed because the evidence establishes that defendants' conduct was random and unauthorized for which plaintiff has adequate state remedies available. Further, defendants assert that plaintiff's common law claims of negligence should be dismissed because defendants are entitled to discretionary immunity.

In its August 9, 1993 Memorandum Decision, as to plaintiff's 42 U.S.C. §1983 claims, this court concluded: (1) Plaintiff did not waive his 42 U.S.C §1983 claims by failing to raise them at the disciplinary hearing and administrative appeal; (2) Plaintiffs procedural due process rights were violated because he was not afforded an adequate opportunity to prepare a defense, nor was he provided with the assistance of counsel in preparing a defense; (3) Plaintiff is entitled to a jury trial on the factual issue of whether he made an effective protest of the waiver of his full due process rights; (4) Plaintiff's substantive due process rights were violated because there was insufficient evidence to support a finding of guilt; (5) The "random and unauthorized conduct" defense did not preclude defendants' liability under 42 U.S.C §1983 because state administrative review failed to provide an adequate postdeprivation remedy; and (6) Defendant Mixdorf is entitled to immunity from suit due to the fact that he was not personally involved in any of the acts upon which plaintiff's 42U.S.C. §1983 action is based. As to plaintiff's common law negligence claims, this court concluded that defendant Ware is entitled to discretionary immunity. This court did not resolve the issue of whether defendant Zangl is entitled to discretionary immunity.

The bases for defendants' motion for reconsideration are: (1) plaintiff alleges random and unauthorized conduct for which plaintiff has adequate state remedies available; (2) sufficient

evidence was produced at the disciplinary hearings to satisfy substantive due process; (3) granting partial summary judgment to plaintiff before trial on the waiver issue is logically inconsistent; and (4) none of the defendants had any personal involvement with any PRC irregularities.

ISSUES PRESENTED

(1) Should plaintiff's 42 U.S.C §1983 procedural due process claims be dismissed because plaintiff alleges random and unauthorized conduct for which plaintiff has adequate state remedies available?

(2) Should plaintiff's 42 U.S.C §1983 substantive due process claim be dismissed because there was sufficient evidence produced at the disciplinary and administrative hearing to satisfy substantive due process?

(3) Should plaintiff's common law negligence claims be dismissed because defendant Zangi is entitled to discretionary immunity.

DECISION

A. 42 U.S.C. §1983 CLAIMS.

(1) Procedural Due Process Claims.

Plaintiff s Complaint alleges various violations of his due process rights in connection, with his disciplinary proceeding, including: (1) inadequate notice of the disciplinary hearing; (2) no opportunity to prepare a defense; (3) no assistance of counsel; (4) no assistance of an advocate; and (5) no opportunity to present witnesses. Defendants argue that these alleged due process

violations do not give rise to a claim under 42 U.S. C §1983 because defendants' actions were random and unauthorized, for which there exist adequate post-deprivation state remedies.

Prisoners subjected to disciplinary proceedings have a liberty interest at stake that is entitled to minimum due process protections, including written notice of the charges, a written statement by the fact-finders as to the evidence relied upon and the reasons for the decision, and an opportunity to call witnesses and present evidence in his or her defense. *Casteel v. Kolb*, 176 Wis. 2d 440, 445, 500 N.W.2d 400 (Ct. App. 1993) *Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1974). In *Casteel*[1] the court stated,

> The State of Wisconsin has codified these protections, and added others, in the administrative code. It follows that if prison officials ignore or violate the rules incorporating the *Wolff* mandates, their conduct would violate the prisoner's constitutional rights. If, however, the officers' actions were "random" and "unauthorized," the violation will not give rise to a claim under 42 U.S.C., sec. 1983, unless the state has failed to provide the prisoner with an adequate postdeprivation remedy for the breach. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). This is so because:
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> > Section 1983 must be preserved to remedy only those deprivations which . . . result from a state's conscious decision to ignore the protections guaranteed by the Constitution. It should not be employed to remedy deprivations which occur at the hands of a state employee who is acting in direct contravention of the state's established . . . procedures which have been designed to guarantee

[1] This case is the cornerstone of Respondent's motion for reconsideration. It issued after all the brief were in, but before the August 9, 1993 Memorandum Decision.

> the very protections which the *employee* now has chosen to ignore. *Easter House v. Felder*, 910 F.2d 1387, 1404 (7th Cir. 1990), *cert. denied*, 112 L. Ed.2d 846 (1991) (emphasis in original).

Casteel, 176 Wis. 2d at 445-446 (footnote omitted).

a. "Random and Unauthorized"

Plaintiff argues that he was denied due process when Mr. Zangl read the waiver form incorrectly and proceeded to hear his conduct report without giving plaintiff the required procedural protections of Wis. Admin. Code §DOC 303.76 (Hearing procedures for major violations), 303.78 (Due process hearing: advocates) and 303.81 (Due process hearing: witnesses). All of the alleged procedural due process violations in this matter stem from defendant Zangl's alleged disregard of plaintiff's request for a full due process hearing. Defendants argue that this is the kind of unpredictable, random and unauthorized failure to follow due process requirements that the State could not foresee. In the August 9, 1993 Decision, it was found that "the denial of plaintiff's due process rights may have been random and unauthorized.[2] For the purposes of this reconsideration, it will be assumed that the acts complained of are properly characterized as "random and unauthorized." This assumption then leads to the next, and most difficult, level of scrutiny.

b. "Meaningful" postdeprivation process

If plaintiff had a "meaningful" postdeprivation process available to him, he lacks a remedy under the fourteenth amendment. *See Casteel*. 176 Wis. 2d at 447 (citation omitted). This court concluded, in its August 9, 1993 Memorandum

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[2] p.21 "Memorandum Decision".

Decision, that state administrative review failed to provide an adequate postdeprivation remedy because the penalties imposed after the first hearing continued to remain in place. However, this conclusion must be re-examined in light of the Court of Appeals' holding in *Casteel*. In *Casteel*, the court held that state *certiorari* proceedings available to inmates for review of prison disciplinary proceedings are both suitable and meaningful. *Id.* at 447.

A writ of certiorari is available to review an inmate's challenge to the procedures used in the disposition of a conduct report. *See State ex rel. Staples v. DHSS*, 115 Wis. 2d 363, 340 N.W.2d 194 (1983). Certiorari review includes the question of whether constitutional due process was provided. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980). Further, in certiorari proceedings, judicial review includes a determination as to whether a committee followed its own rules governing the conduct of its hearings, because an agency is bound by its own procedural rules under state law.[3] *Meeks*, 95 Wis. 2d at 119.

Additionally, plaintiff had the Inmate Complaint Review System (ICRS) available to him. The fact that a plaintiff could not get monetary relief through the ICRS or certiorari did not for the majority of the *Casteel* court render those remedies inadequate. In *Casteel*, the court held that postdeprivation remedies provided by the state will not be considered inadequate even if they fail to provide all the relief which may have been available had plaintiff proceeded under § 1983. *Casteel*, 176 Wis. 2d at 447 (citations omitted).

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[3] If prison officials violate "'non-*Wolff*' rules, they may have violated state law, but the prisoner would have no constitutional claim because a state-created procedural right is not itself a liberty interest within the meaning of the fourteenth amendment." *Casteel*, 179 Wis. 2d at 445, n.2 (citations omitted).

Basically all that is presented in that decision about John Casteel and the wrongs for which he sought § 1983 redress is: that he "is a frequent litigator in this court," (at p. 443) and "was the subject of many prison disciplinary proceedings throughout the years of his incarceration, and his claims against the defendants are based upon their participation in nineteen such proceedings." (at p. 444). His potential loss of monetary damages does not faze the majority who apparently find him to be an unsympathetic litigant.

The plaintiff in this action, by contrast, appears to be worthy of every consideration.[4] He was released to the community placement from which this flawed disciplinary proceeding removed him because he is becoming more and more incapacitated from Lou Gehrig's disease which is usually fatal within two to three years of onset. This physical condition, according to plaintiff, renders him incapable of the acts forming the basis of the incident report. It also makes his placement back at the prison of greater impact in terms of his care and of its potentially deleterious health effects. His physical condition also makes Mr. Santiago far less able to insist on his basic rights, to abide working the matter through a certiorari process, and to sustain the loss of the right to seek monetary damages for the injustices he claims. Certiorari could return only the time ordered extending his mandatory release date; by itself, it could not get him back into a nursing home placement. In fact, at the time the original decision issued in this case, Mr. Santiago was still not back in a nursing home, more than a year after the due process violations he alleges. To conclude that the loss of the right to sue for damages, in a situation such as this, is still a "meaningful review" is to constrict use of the word "meaningful" to apply solely to legal vindication --- a victory of words only.

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[4] See, i.e. 42 USC 12101, "Americans with Disabilities Act." 1990.

As pointed out in plaintiff's response brief, certiorari is limited to the record created in the disciplinary proceeding, and one of plaintiff's main contentions is that this record is woefully inadequate.

The inadequacy of certiorari was determined in a far less compelling case:

> [Surdevant] suffered two distinct harms for the defendants' alleged violation of the disciplinary hearing procedures: (1) he was place in adjustment segregation for eight days and (2) he lost four days of good-time credits. Even though he could seek to expunge his conduct report and to recover his lost good-time credits through state certiorari review, he could not pursue any remedy for his allegedly wrongful placement in adjustment segregation. To the extend that certiorari review does not provide any redress for that distinct harm, which is the only harm that Sturdevant seeks to redress in this action, it is a meaningless and therefore inadequate post-deprivation remedy... *Sturdevant v. Haferman*, 298 F. Supp. 536, 541 (E.D. Wis. 1992).

The powerful dissent in *Casteel*,[5] presents a scholarly, well-reasoned analysis of why, absent § 1983 damages, Mr. Santiago lacks a meaningful postdeprivation remedy. It is adopted by reference as foundation for the reasoning behind this decision. The Federal District Court of the Eastern District of Wisconsin views the efficacy of certiorari identically to Judge Sundby. Geography or choice of federal or state courts should not be the determiner of access to so fundamental a tool as a law suit in state court pursuant to 42 USC 1983. Rather, the goals set and the reasoning offered by the final arbiter of our constitutional rights:

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[5] pp.450-456.

the United States Supreme Court should guide this determination: "States, however, may no more condition the federal right to recover for violations of civil rights than bar that right altogether." *Felder v. Case*, 487 US 131, 101 L Ed 2d 123, 141 (1988).

Mr. Santiago's case is distinguishable from *Casteel* by virtue of the magnitude of the harm suffered by Mr. Santiago during the hundreds of days he was deprived of nursing home care. The *Casteel* court did not have the fact situation presented in the instant matter to illuminate the need to reexamine the meaningfulness of only certiorari as a remedy.

(2) Substantive Due Process Claims.

Plaintiff alleges that his substantive due process rights were violated by defendants when they found him guilty of violating Wis. Admin. Code §DOC 303.63 (Violations of institutional policies and procedures) and 303.28 (Disruptive conduct) without any evidence to support such findings. In its August 9, 1993 Memorandum Decision, this court concluded that sufficient evidence was not produced at the disciplinary hearing to satisfy substantive due process. That conclusion was based upon the courts finding that the only evidence presented to support plaintiff's guilt was a written conduct report and the oral testimony by a named, but unidentified, Mr. Jon Schubert.

In *Superintendent v. Hill*, 472 U.S. 445 (1985), the United States Supreme Court held:

> the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board . . . . This evidence is met if "there is some evidence from which the conclusion of the administrative tribunal could be deduced." Ascertaining whether this standard is satisfied does not require examination of the entire record,

> independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion. *Id.* at 455.

In *Hill*, the evidence relied upon came from a prison guard who was actually present at the scene and who presented information from which legitimate inferences could be drawn. Writing for the majority in *Hill*, Justice O'Connor also stated:

> The requirements of due process are flexible and depend on a balancing of the interests affected by a relevant government action. E.g. *Cafeteria Workers v. McElroy*, 367 US 886, 6 L Ed 2d 1230, 81 S Ct 1743 (1961) *Id.* at 454.

The inmate in *Hill* was trying to remedy loss of good time. Mr. Santiago, however, is seeking redress for more than a year of being deprived of appropriate care and a modicum of comfort. The flexibility cited by Justice O'Connor tilts the balance in favor of the significant interests affected by decisions foisted upon Mr. Santiago.

In Cato v. Rushen, 824 F.2d 703 (9th Cir. 1987), the court held that there must be some indica of reliability of the information that forms the basis for prison disciplinary actions. *Id.* at 705 (citations omitted). In this case, as defendants point out in their Brief in Support of Reconsideration, the adult conduct report issued to plaintiff identifies Mr. Schubert, on its face, as the staff member completing the report. The conduct report of Mr. Schubert, a DOC employee, can be equated with the uncorroborated statement of the confidential informant found insufficient in *Cato* to meet the "some evidence" requirement. Just because Wis. Admin. Code §DOC 303.66, expressly provides that DOC employees are to write a conduct report, regardless of

whether they witnessed the incident in question does not cure the defects in the evidence relied upon. The report penned by Mr. Schubert is dated eleven days after the incident forming the basis for the disciplinary action taken against Mr. Santiago.[6] Nothing in the report indicates whether Mr. Schubert received this information from someone else or from a person who received it from someone else. The source of the statements contained on the report is simply unknown.

Defendants would elevate a staff member to a higher level of credibility. Mr. Kirsch's argument that "all men are equal in the Court and ... the law is not respecter [sic] of men or titles,"[7] has a certain appeal. Nonetheless, the point is, that "...reliability is not the critical issue. He only knew what he had been told..." *Cato* at 705. No one is questioning the accuracy of Mr. Schubert's reporting; the question is: upon what is that reporting based? Given that there may have been evidence (never received) that Mr. Santiago was physically incapable of what Mr. Schubert was reporting, the source and a determination of that source of Mr. Schubert's statements becomes even more critical.

There was not sufficient, reliable evidence produced at the disciplinary and administrative hearing to satisfy substantive due process. Accordingly, plaintiff's 42 U.S.C. §1983 substantive due

B. STATE LAW NEGLIGENCE CLAIM AGAINST DEFENDANT ZANGL.

Plaintiff alleges that defendant Zangl was negligent when he misread a notation on the Notice of Major Disciplinary Hearing Rights form as signifying that plaintiff waived a formal hearing. Defendant Zangl contends that he is entitled to

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[6] See Plaintiff's exhibit "A" and Defendants' Exhibit 102.

[7] Plaintiff's brief on reconsideration p. 4.

discretionary immunity as the alleged negligent acts involved the performance of non-ministerial functions.

The general rule in Wisconsin is that a public officer or employee is immune from personal liability for injuries resulting from acts performed within the scope of the individual's public office. *C.L. v. Olson*, 143 Wis. 2d 701, 710, 422 N.W.2d 614 (Ct. App. 1987). The doctrine of public immunity provides no protection to the public employee for: (1) the negligent performance of a purely ministerial duty; (2) conduct that is malicious, willful and intentional; or (3) for the exercise of nongovernmental discretion.[8] *Id.* at 710-711, 718.

A duty is deemed ministerial where it is absolute, certain and imperative, involving merely the performance of a specific task, and either (1) the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for the exercise of judgment or discretion, or (2) there exists a known present danger of such force that the time, mode, and -occasion for performance is evident with such certainty that nothing remains for the exercise or judgment or discretion. *Id.* at 717. As was found in the August 9, 1993 Decision, there was no known present danger in this case.

Defendant Zangl's evaluation of whether the waiver box had been checked and the meaning of that notation, seems to meet the definitions cited-above for a ministerial task. Either there had been a proper waiver or there had not. The duty was to look at the paper, to read it properly, and to act accordingly. It was this defendant's duty to determine that question by looking at the

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[8] There is no allegation in this case that defendants' conduct was malicious, willful and intentional. Further, this case does not involve the exercise of non-governmental discretion. The professional discretion exception to discretionary immunity has a very narrow application. *See Linville v. City of Janesville*, 174 Wis. 2d 571, 584, 497 N.W.2d 785 (Ct. App. 1993).

document and determining what boxes were checked and whether the inmate's signature appeared in the appropriate place. Few duties could be more ministerial in nature. However, movant is correct in stating that the province of the fact-finder was invaded by the court in making any finding, at this stage, that Defendant Zangl performed this ministerial assignment negligently. That issue is, indeed, one which the fact-finder must determine. The sole decision to be made at this stage is whether immunity should attach to this defendant's actions in regard to waiver. On that issue, the earlier ruling is maintained, but the additional conclusion that this function was negligently performed is vacated and preserved for a jury to decide.

CONCLUSION

As to plaintiff's 42 U.S.C §1983 claims, this court confirms: (1) that defendants' alleged violations of plaintiff's procedural due process rights do give rise to a claim under 42 U.S.C. §1983, in that there are no adequate postdeprivation state remedies available to plaintiff; (2) a jury trial is necessary to resolve whether plaintiff made an effective protest of the waiver of his full due process rights; and (3) there was insufficient evidence produced at the disciplinary and administrative hearings to satisfy substantive due process. As to plaintiff's common law negligence claims, this court concludes that defendant Zangl is not entitled to discretionary immunity. Therefore, defendants' motion for reconsideration is denied except to preserve for jury determination the issue of whether defendant Zangl performed is ministerial duty on the waiver question negligently.

ORDER

For the above-stated reasons, except on the issue of reserving the question of negligence by defendant Zangl in determining plaintiff's waiver of a hearing and other rights,

defendants' motion for reconsideration is **DENIED.** This matter is set for telephonic pretrial on May 3, 1994 at 10:30 AM. Mr. Kirsh is to provide the Court with a telephone number at which he can be reached. If Mr. Santiago also wishes to be part of the pretrial, he is also to provide a telephone number, and if both Mssrs. Kirsh and Santiago are joining the conference, the call will have to be initiated by the attorney general's office due to the limitations of the court's telephone system.

Dated this 19th day of April, 1994 at Madison, Wisconsin.

BY THE COURT:

/s/ Hon. Moria Krueger, Judge
Circuit Court, Branch 7

cc: Atty. Stephen J Nicks, Assistant Attorney General
Mr. Jamie Santiago
Mr. Kevin Kirsch
Ms. Lydia Santiago

STATE OF WISCONSIN
CIRCUIT COURT, BRANCH VII
COUNTY OF DANE

JAIME SANTIAGO,

Plaintiff,

v. Case No. 92-CV-3906

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL and DENNIS DANNER,

Defendants.

MEMORANDUM DECISION AND ORDER

BACKGROUND

Plaintiff commenced this action on September 28, 1992, pursuant to 42 U.S.C. §1873 and state tort law. Plaintiff filed a supplemental summons and complaint on March 5, 1993. In his complaint, plaintiff alleges that defendants violated his constitutional rights by denying him a full due process hearing and by finding him guilty without some reliable evidence of his guilt, and the defendants negligently deprived him of his state-created liberty interests.

Plaintiff filed a motion for summary judgment on December 28, 1992. On February 3, 1993, defendants filed a cross-motion for summary judgment. In its August 9, 1993 Memorandum Decision, as to plaintiff's 42 U.S.C §1983

claims, this court concluded: (1) plaintiff did not waive his 42 U.S.C §1983 claims by failing to raise them at the disciplinary hearing and administrative appeal; (2) plaintiff's procedural due process rights were violated because he was not afforded an adequate opportunity to prepare a defense, nor was he provided with the assistance of counsel in preparing a defense; (3) plaintiff is entitled to a jury trial on the factual issue of whether he made an effective protest of the waiver of his full due process rights; (4) plaintiff's substantive due process rights were violated because there was insufficient evidence to support a finding of guilt; (5) the "random and unauthorized conduct" defense did not preclude defendants' liability under 42 U.S.C §1983 because state administrative review failed to provide an adequate post-deprivation remedy; and (6) defendant Misdorf is entitled to immunity from suit due to the fact that he was not personally involved in any of the acts upon which plaintiff's 42 U.S.C §1983 action is based. As to plaintiff's common law negligence claims, this court concluded that defendant Ware is entitled to discretionary immunity. This court did not resolve the issue of whether defendant Zangl is entitled to discretionary immunity.

On August 26, 1993, defendants filed a motion for reconsideration. The bases for defendants' motion for reconsideration were: (1) plaintiff alleges random and unauthorized conduct for which plaintiff has adequate state remedies available; (2) sufficient evidence was produced at the disciplinary hearings to satisfy substantive due process; (3) granting partial summary judgment to plaintiff before trial on the waiver issue is logically inconsistent; and (4) none of the defendants had any personal involvement with any Program Review Committee (PRC) irregularities.

In a Memorandum Decision and Order, dated April 4, 1994, this court, as to plaintiff's §1983 claims, confirmed:

(1) defendants' alleged violations of plaintiff's procedural due process rights give rise to a claim under 42 U.S.C. §1983, in that there are no adequate post-deprivation state remedies available to plaintiff; (2) a jury trial is necessary to resolve whether plaintiff made an effective protest of the waiver of his full due process rights; and (3) there was insufficient evidence produced at the disciplinary and administrative hearings to satisfy substantive due process. As to plaintiff's common law negligence claims, this court concluded that defendant Zangl is not entitled to discretionary immunity. Therefore, this court denied defendants' motion for reconsideration, except to preserve for jury determination the issue of whether Zangl negligently performed his ministerial duty on the waiver question.

On August 12, 1993, defendant Zangl moved to reconsider based on *Casteel v. Kolb*, 176 Wis. 2d 440 (Ct. App. 1993), which was decided after the summary judgment motion was briefed and submitted. This court denied the motion on April 19, 1994.

Currently, there are three motions for reconsideration before the court. The first, filed by defendants on June 8, 1994, requests this court to reconsider its decision on summary judgment regarding whether defendant Zangl is entitled to qualified immunity. The second, filed by defendants on June 30, 1994, requests this court to reconsider its decision of April 19, 1994 in light of the Wisconsin Supreme Court decision in *Irby v. Macht*, Case No. 90-2662, issued on June 17, 1994. The third motion, filed by plaintiff on July 1, 1994, requests this court to reconsider its decision to grant defendant Ware discretionary immunity for her classification of the acts alleged in the conduct report as a major offense pursuant to Wis. Admin. Code §DOC 303.68(3).

This decision will address and resolve only the issues regarding defendant Zangl's entitlement to qualified immunity and the viability of plaintiff's procedural due process claims in light of the Wisconsin Supreme Court decision in *Irby v. Macht*.

ISSUES PRESENTED

(1) Does plaintiff have a protected liberty interest which has been interfered with by the State?

(2) If so, were the procedures attendant upon the deprivation of plaintiff's liberty interest constitutionally sufficient?

(3) Is defendant Zangl entitled to qualified immunity?

DECISION

I. VIABILITY OF PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIMS IN LIGHT OF *IRBY*.

> [P]rocedural due process questions are examined in two steps: "the first asks whether there exists a liberty ... interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Thus, we must first determine whether [the individual] has been deprived of a protected liberty interest. If such a deprivation occurred, we reach the second step of the analysis.

Casteel v. McCaughtry, 176 Wis. 2d 571, 579, 500 N.W.2d 277 (1993), *quoting Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted).

A. Liberty Interest.

The first part of the analysis involves a determination as to whether plaintiff has been deprived of a protected liberty interest. The types of interests that constitute "liberty" and "property" for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than an abstract need or desire, and must be based on more than a unilateral hope. *Thompson*, 490 U.S. at 460 (citations omitted). An individual claiming a protected liberty interest must have a legitimate claim of entitlement to it. *Id.* "Protected liberty interests `may arise from two sources - the Due Process Clause itself and the laws of the States.'" *Id.*

> According to the United States Supreme Court in *Thompson*, the method of inquiry for determining whether a state statute or regulation creates an enforceable liberty interest is to "examine closely the language of the relevant statutes and regulations" to ascertain whether the state has established "`substantive predicates' to govern the decisionmaking..." and further whether the statute or regulation mandates "the outcome reached upon a finding that the relevant criteria have been met." *Thompson*, 490 U.S. at 461-62. This inquiry was also described in *Thompson* as a requirement that "the regulations contain `explicitly mandatory language,' i.e., specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Id.* At 463.

Casteel, 176 Wis. 2d at 579-80.

For purposes of determining whether a liberty interest is created by a given regulation, it makes no difference that the statute does not *require* but only permits the disposition. *Casteel*, 176 Wis. 2d at 581 (emphasis in original).

> This conclusion is supported by the United States Supreme Court's decision in *Hewitt v. Helms*, 459 U.S. 460 (1983). In *Hewitt*, the regulation at issue provided that "`[a]n inmate *may* be temporarily confined to Close or Administrative Custody ... where it has been determined that there is a threat of serious disturbance, or a serious threat to the individual or others.'" *Id.* At 470-71, n.6 (emphasis added). Despite the fact that the regulation permitted, but did not require, that a prisoner be temporarily confined, the United States Supreme Court concluded that because the statute mandated that the administrative segregation *will not* occur absent specified substantive predicates, it created a protected liberty interest.

Id. At 582.

The parties agree that the ten day extension on plaintiff's mandatory release date implicates a protected liberty interest. The more difficult question is: whether plaintiff has a protected liberty interest in maintaining his Community Residential Confinement (CRC) placement.

Defendant Zangl contends that plaintiff has no protected liberty interest in remaining in CRC because the due process clause does not protect an inmate's interest in being free from

prison-to-prison transfers.[1] *Citing, Meachum v. Fano*, 427 U.S. 215, 225 (1976). Further, defendant argues, state law does not impose a substantive limitation on official discretion by mandating a certain outcome upon a finding that relevant criteria have been met. Rather, the decision whether to terminate an inmate from CRC is discretionary.

Plaintiff argues that he has a state-created liberty interest in maintaining his CRC placement. Specifically, plaintiff argues that state law: (1) provides that termination from CRC can be imposed only if specified substantive predicates exist and (2) mandates that certain due process protections be accorded before an inmate is terminated from CRC placement. Plaintiff's arguments are persuasive.

First, Wisconsin has established substantive predicates to govern official decision making regarding termination of CRC placement. Specifically, Wis. Admin. Code §DOC 327.10 provides that an inmate's placement may be terminated for any of the following reasons:

> (1) At the inmate's request, subject to approval of the PRC; or
>
> (2) If there is a change of circumstances including a medical condition of the loss of a job, school or treatment program; or
>
> (3) If the department determines that the inmate has committed one or more of the following:
>
> (a) Violation of a state or federal statute of local ordinance;

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[1] Defendant contends that the nursing home from which plaintiff was transferred is a correctional institution. *Citing* §301.046(1), Wis. Stats.

(b) Violation of the rules of any facility in which the inmate is held or to which the inmate is assigned;

(c) Violation of the administrative rules of the department with the modifications described in s. DOC 327.09;

(d) Violation of the community residential confinement agreement; or

(e) Violation of any special condition imposed on the inmate's CRC placement.

As states above, it makes no difference that DOC 327.10 does not *require*, but only permits, the termination of CRC placement. *See Casteel*, 176 Wis. 2d at 581, *quoting Thompson*, 459 U.S. at 470-71, n.6. The important factor is that termination of CRC placement will not occur absent one of the specified substantive predicates in DOC 327.10(1)-(3). *Id.*

Second, the Wisconsin Administrative Code uses "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed." *Hewitt*, 459 U.S. at 471-72. Specifically, Wis. Admin. Code §DOC 327.11(3) provies that "[i]f the placement is terminated under s. DOC 327.10(3), the inmate *shall* be afforded a hearing under s. DOC 327.13 for the purposes of determining whether the alleged violation occurred." (emphasis added). DOC 327.13(5) further mandates that a full due process fact-finding hearing *shall* be conducted pursuant to DOC 327.13. Thus, the regulations prescribe not only that an inmate's CRC placement may be terminated for one of the reasons listed in DOC 327.10, but that when termination if predicated upon misconduct, the inmate shall be afforded a full due process hearing.

DOC 327.11(6) provides for mandatory PRC review if the inmate is found to have committed the alleged violation:

> In order to terminate the CRC placement, if the inmate is found under sub. (5) to have committed the violation alleged, the case *shall* be referred to the CRC PRC for review. The PRC may recommend a termination in the inmate's CRC placement, a change in the inmate's security classification, a transfer or take any other action considered appropriate. PRC review of the inmate's CRC placement *shall* be conducted in accordance with ss. DOC 302.19 and 302.20.

(emphasis added).

The regulations governing PRC review, Wis. Admin. Code §§DOC 302.19 (Program review procedure) and 302.20 (Inter-institution transfers), contain similar mandatory language requiring that certain procedures "shall" and "must" be employed. For example, a PRC staff member *shall* interview the inmate and inform him or her of the date of the review, the criteria for the review, the facts to be considered, and the fact that the inmate has the option to appear before the PRC. (DOC 302.19(1)). Further, if the inmate appears at the review, he or she *shall* be afforded the opportunity to present additional facts, dispute facts being considered, and state an opinion as to the appropriate security classification or program assignment (DOC 302.19(3)). Reasons for the PRC's decision *shall* be given to the inmate in writing and *shall* include the specific facts relied upon and the criteria to which the facts were applied. (DOC 302.19(10)).

In the recent Wisconsin Supreme Court decision of *Irby v. Macht*, the court employed similar reasoning in recognizing a

state-created liberty interest in remaining in the general prisxon population, and free from adjustment or program segregation. *Irby v. Macht*, Slip Opinion 90-2662, at 7 (June 17, 1994). The *Irby* court reasoned that the administrative regulations provide that adjustment and program segregation can only be imposed for violation of a "major offense." *Id.* Further, the court noted:

> [DOC chapter 303] also lists procedures that *must* be complied with before inmates can be found guilty of a major offense. For instance, the prisoner must be given prior notice of the disciplinary hearing, the prisoner has a limited right to call witnesses, and the prisoner must be provided a written copy of the disciplinary committee's decision, including the basis for its decision.

Id. At 7-8 (emphasis in original) (footnotes omitted).

The Wisconsin Administrative Code's repeated use of explicitly mandatory language requiring that certain procedures shall be employed and that CRC placement will not be terminated absent specified substantive predicates, demands a conclusion that Wisconsin has created a protected liberty interest in remaining in CRC placement.

B. Constitutionally Adequate Procedures.

The second step of the analysis focuses on whether the procedures attendant upon that deprivation were constitutionally sufficient.

The Fourteenth Amendment's Due Process Clause does not prevent states from depriving persons of their life, liberty or property. Rather, the Due Process Clause protects only against

those deprivations which occur "without due process of law." *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (citations omitted). Generally, due process requires some kind of a hearing before the State deprives a person of liberty or property. *Zinernon v. Burch*, 494 U.S. 113, 127 (1990) (citations omitted). If, however, the deprivation results from the "random and unauthorized" acts of officials, the State will be unable to predict deprivations and will be unable to provide predeprivation process. *Id.* At 129. In cases where predeprivation safeguards are not possible due to the "random and unauthorized" nature of the deprivation, adequate postdeprivation procedures may satisfy the due process requirement. *Id.* When predeprivation procedures are feasible, they must generally be provided regardless of the adequacy of post-deprivation remedies. *Id.* at 132. Thus, this court must determine whether defendant's conduct was random and unauthorized.

1. Random and Unauthorized Conduct.

An official's conduct is only "random and unauthorized" when it is so unpredictable that it would be impossible for the state to provide predeprivation remedies. *Zinermon*, 494 U.S. at 132. (*Parratt* and *Hudson* emphasize the State's inability to provide predeprivation process because of the random and unpredictable nature of the deprivation). Postdeprivation procedures satisfy due process only "in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake ... or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest." *Id.* (citations omitted). Thus, "the controlling inquiry is solely whether the state is in a position to provide for predeprivation process." *Easter House v. Felder*, 910 F.2d 1387, 1397 (7th Cir. 1990), *quoting Hudson v. Palmer*, 468 U.S. 517, 534 (1984).

In *Parratt v. Taylor*, 451 U.S. 527 (1981), a prison official negligently misplaced an inmate's mail-order hobby materials. The inmate sued the official under 42 U.S.C. §1983, claiming that he had been deprived of property without due process of the law. The United States Supreme Court dismissed his complaint. *Id.* at 543. The court reasoned that because the deprivation resulted from the negligence of an employee, the state was unable to predict when the loss would occur and, thus, it would have been impossible for the state to have provided a meaningful predeprivation hearing. *Id.* at 541. The court concluded that the state could remedy the random and unauthorized deprivation by providing meaningful postdeprivation remedies to redress the injury. *Id.*

Similarly, in *Hudson v. Palmer*, 468 U.S. 517 (1984), the United States Supreme Court concluded that the intentional destruction of an inmate's property by a prison guard during the course of a "shakedown" search did not give rise to a claim under 42 U.S.C. §1983. *Id.* at 536. Although the deprivation resulted from an employee's intentional rather than negligent action, the court believed that the underlying rationale of *Parratt* applied:

> Whether an individual employee himself [or herself] is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process.

Id. at 534. The court concluded that the employee's action were random and unauthorized, reasoning that the state can no more anticipate the random and unauthorized intentional conduct of its employees than it can similar negligent conduct. *Id.* at 533.

The court examined the random and unauthorized doctrine in *Zinermon v. Burch*, 494 U.S. 113 (1990). In *Zinermon*, the plaintiff claimed that he was deprived of liberty when various physicians, administrators, and staff members of Florida state Hospital (FSH) allowed him to be voluntarily admitted for psychiatric care when they knew, or should have known, that he was not competent to give informed consent to treatment. *Id.* at 114-15. The court held that the defendant's actions were not random and unauthorized. *Id.* at 138-39.

The *Irby* court summarized the *Zinermon* court's reasoning as follows:

> Reviewing the pertinent Florida regulations, the Court found that all a person needed to do to be voluntarily admitted to a state mental health facility was to sign an admission form. The regulations did not establish any type of procedure requiring staff members to confirm that the applicant was in fact competent to give the "express and informed consent" required for voluntary placement. Given these facts, the Court held that Florida's failure to mandate adequate predeprivation procedures effectively delegated to the defendants broad discretion to admit patients on a "voluntary" basis without having to confirm their competency. As a result, the fact that an incompetent person was "voluntarily" admitted was neither unpredictable, unamenable to predeprivation procedures, nor unauthorized. The defendants were not acting randomly or without authority. On the contrary, the statutes in question delegated to the defendants the ability to do precisely what they did, i.e., admit the plaintiff without first confirming his competency.

Irby, at 10-11, *citing*, *Zinermon*, 494 U.S. at 134-38.

The court concluded that when the state chooses to vest officials with discretion to effect a particular deprivation of liberty, the state also has a duty to insure that no deprivation occurs without due process:

> Florida chose to delegate to petitioners a broad power to admit patients to FSH, i.e., to effect what, in the absence of informed consent, is a substantial deprivation of liberty. Because petitioners had state authority to deprive persons of liberty, the Constitution imposed on them the State's concomitant duty to see that no deprivation occurs without adequate procedural protections.
>
> It may be permissible constitutionally for a State to have a statutory scheme like Florida's, which gives state officials broad power and little guidance in admitting mental patients. But when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the state officials cannot then escape liability by invoking *Parratt* and *Hudson*. It is immaterial whether the due process violation Burch alleges is best described as arising from petitioners' failure to comply with state procedures for admitting involuntary patients, or from the absence of a specific requirement that petitioners determine whether a patient is competent to consent to voluntary admission.

Zinermon, 494 U.S. at 135-36.

Plaintiff's arguments focus on the defendant's conduct in holding the hearing as a waiver hearing, and he argues that *Zinermon* should control. Specifically, defendant's actions

were not random and unauthorized because the deprivation could have been prevented by predeprivation procedures.

First, plaintiff argues, the deprivation was predictable because it would always occur at a specific, predictable point in the disciplinary process - at the time the waiver hearing was held. Because defendants knew when the deprivation would occur, it would have been possible to provide a predeprivation safeguard. Prior to initiating the waiver hearing, the hearing officer could simply ask the inmate if he had knowingly and freely waived his or her right to a full due process hearing.

Secondly, plaintiff argues, the conduct was not unauthorized. Unlike the defendants in *Irby* who acted in direct contravention of the Wisconsin Administrative Code, the defendants in this case did not ignore established procedure. Rather, as was the case in *Zinermon*, there is no established procedure requiring defendants to verity that an inmate has, in fact, waived his due process rights. Thus, defendants abused their positions of authority by failing to safeguard plaintiff's due process rights prior to holding the waiver hearing.

Defendant's arguments focus on his conduct during the course of the disciplinary hearing itself (i.e., the failure to provide the procedures inmates must be afforded with respect to disciplinary hearings), and he argues that *Parratt* and *Hudson* control the outcome of this case. However, plaintiff's focus is more to the point.

Plaintiff's analysis is correct because the decision to conduct the hearing as a waiver hearing resulted in plaintiff being denied the procedures inmates must be afforded with respect to disciplinary hearings. Furthermore, plaintiff's arguments are persuasive: defendant's conduct and plaintiff's

resulting deprivation were predictable, amenable to predeprivation procedures, and authorized.

The deprivation is predictable because it occurs at a predictable point in the disciplinary process: namely, just before the waiver hearing is held. Further, the state is in a position to provide for predeprivation process and the implementation of safeguards could address the risk of deprivation of the kind alleged. Simply verifying whether the inmate indeed intended to waive his or her right to a full due process hearing is an available safeguard. Such a safeguard would not be unduly burdensome. As plaintiff noted, defendant Zangl testified in his July 12, 1994 deposition that it would not be burdensome to verify whether an inmate had intended to waive his due process rights. (Todd Zangl Deposition, at 65, attached as Exhibit A to Lawrence Bensky Affidavit). In fact, Daniel Benzer, A Department of Corrections' employee who has held numerous disciplinary hearings, testified that he routinely asks inmates to confirm that they have waived their right to due process. (Daniel Benzer Deposition, at 18-19, attached as Ex. B. to Bensky Aff.)

Finally, the conduct was not unauthorized for the reasons set forth by plaintiff. The regulations do not establish any type of procedure requiring staff members to confirm that the inmate has in fact waived his or her right to due process. On the contrary, the regulation delegated to defendant the ability to do precisely what he did, i.e., hold the hearing as a waiver hearing without first confirming that plaintiff had waived his right to a due process hearing. *See Irby*, at 11.

Because of this finding that defendant's actions were not random and unauthorized, the state cannot remedy the deprivation by providing postdeprivation remedies. However, even if this court is in error and defendant's actions were

random and unauthorized, available postdeprivation remedies are inadequate as to plaintiff's termination from CRC placement.

2. Inadequacy of Postdeprivation Remedies.

As to the 10 days mandatory release extension, defendant correctly argues that the state remedies of certiorari and the Inmate Complaint Review System (ICRS) are adequate because the disciplinary committee's decision can be overturned, the inmate's record expunged, and the mandatory release date reinstated. *See Irby*, at 13. However, as to plaintiff's termination from CRC placement, state postdeprivation remedies are inadequate for the reasons cited in this court's April 19, 1994 Memorandum Decision and Order, at 6-8. Furthermore, the recent Wisconsin Supreme court decision in *Irby* supports this court's earlier determination.

In *Irby*, the court sated that he adequacy of postdeprivation remedies must be measured by the nature of the alleged unauthorized deprivation." *Irby*, at 14 (citations omitted). Measuring the postdeprivation remedies by the nature of the alleged deprivation in this case, this court concluded in its April 19, 1994 decision that the postdeprivation remedies available to plaintiff were inadequate "by virtue of the magnitude of the harm suffered by Mr. Santiago during the hundreds of days he was deprived of nursing home care." (Memorandum Decision and Order, dated April 19, 1994, at 8). This plaintiff's extremely compromised physical condition must be kept in the forefront of our thinking when contemplating the extent of the deprivation of the nursing home care in contrast to a prison setting. As plaintiff argues, having been removed from his community placement where his life was virtually free of institutional restraints, he suffered a substantial rather than a limited deprivation. The available postdeprivation remedies are

constitutionally inadequate because they cannot provide redress for plaintiff's allegedly wrongful termination from CRC placement. Thus, the remedies of certiorari review and ICRS are meaningless.

II. DEFENDATN ZANGL'S ENTITLEMENT TO QUALIFIED IMMUNITY.

The qualified immunity defense is available to government officials who perform discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). These officials generally are shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* (citations omitted). Whether an official is entitled to the protection of qualified immunity depends upon: (1) whether the conduct in question violated a clearly established right, and (2) whether the conduct, as measured by reference to the clearly established law, was objectively reasonable. *Davis v. Scherer*, 468 U.S. 183, 191 (1984). Subjective beliefs are irrelevant. *Harlow*, 457 U.S. at 818.

The plaintiff bears the burden of proving the existence of a clearly established right. *Mitchell v. Forsyth*, 471 U.S. 511, 526 (1985). It is not enough simply to assert entitlement to a generalized right. *Anderson v. Creighton*, 483 U.S. 635,639 (1987).

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right. This is not to say that an official actin is protected by qualified immunity unless the very action in question has previously been held unlawful,. . .but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Id.*

(citation omitted). In other words, "the 'clearly established law' must be "sufficiently analogous to provide the public official with guidance as to the lawfulness of his or her conduct." *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 408, 479 N.W. 2d 917 (1992).

Defendant Zangl contends that he is entitled to qualified immunity for his conduct of conducting plaintiff's hearing as a waiver hearing and for his reliance on the evidence before him to adjudicate guilt because he acted reasonably under settled law. First, he contends that when he arrived at Waupun Correctional Institution (WCI) to conduct the hearing, he was given a packet of materials relating to this matter, including the conduct report indicating that the type of hearing was to be on waiver. He maintains that he knows of no statutory or case law which would have put him on notice that this conduct was illegal.

Second, Zangl contends that there is no authority which would inform him that a finding of guilt based upon the conduct report signed by staff member Schubert and on the information furnished by plaintiff himself, violated any particularized right of plaintiff. Rather, Zangl argues that the conduct report contains more than sufficient evidence to support a finding of guilt and is admissible even though it is hearsay and the reporting officer was not present to observe the conduct.

Plaintiff contends that Zangl is not entitled to qualified immunity because the specific due process right at stake were clearly established long before the July, 1992 disciplinary hearing. First, plaintiff maintains an inmate's right to a full due process hearing was clearly established 20 years ago in *Wolff v. McDonnell*, 418 U.S. 539 (1974); *See also*, *Saenz v. Murphy*, 153 Wis. 2d 660, 677-78, 451 N.W. 2d 780 (Ct. App. 1989)

(Due process rights of an inmate were clearly established in *Wolff v. McDonnell*). Second, plaintiff contends that by July 1992, it was clearly established, by *Superintendent v. Hill*, 472 U.S. 445, 455 (1985), that a prison official must have "some evidence" to support his decision to find an inmate guilty. It was also clearly established that the evidence supporting a finding of guilt must be reliable and that a decision based solely on unreliable evidence violates the *Hill* standard. *Citing Viens v. Daniels*, 871 F.2d 1328, 1335 (7th Cir. 1989); *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987) (evidence must have some indicia of reliability).

Because these rights were clearly established by July 2, 1992, plaintiff argues, a reasonable official should have known that the failure to provide plaintiff with a full due process hearing, absent an effective waiver, and that finding him guilt without some reliable evidence of his guilt, violated his due process rights. *Citing Barnhill*, 166 Wis. 2d at 407 (immunity defense fails if law was clearly established because a reasonably competent official should know clearly established law).

Plaintiff has satisfied his burden of proving a clearly established right, absent an effective waiver, to a full due process hearing. *See Wolff and Barnhill*. Further, the established law is sufficiently analogous so as to have provided defendant with guidance as to the lawfulness of his conduct. Defendant's conduct, in light of the clearly established law, was objectively unreasonable. As plaintiff points out, his subjective belief that he properly held the hearing as a waiver hearing is irrelevant.[2] *See Anderson*, 483 U.S. at 641.

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[2] Plaintiff contends that "[n]ot only is Zangl's belief that the waiver notation justified his decision to hold the hearing on waiver legally irrelevant, but in light of his earlier argument that he had mistakenly interpreted plaintiff's waiver of hearing form, it is also disingenuous. See, Brief in Supplemental

Similarly, plaintiff has satisfied his burden of demonstrating that, at the time of the act in question, it was clearly established that an inmate may not be adjudicated guilty without some reliable evidence supporting the finding. See *Zavaro v. Coughlin*, 970 F.2d 1148, 1153-54 (2d. Cir. 1992) (hearing officer not entitled to qualified immunity for finding an inmate guilty without some evidence); *Engel v. Wendl*, 921 F.2d 148, 150 (8th Cir. 1990) (members of prison disciplinary committee not entitled to qualified immunity for imposing punishment without some supporting evidence).

Further, the law set forth by plaintiff is sufficiently analogous to provide the public official with guidance as to the unlawfulness of his or her conduct. *See Zavaro*, 970 F.2d at 1153-54 (uncorroborated statements by unidentified informants and statements of guards who were present at prison riots did not satisfy "some reliable evidence" requirement); *Cato*, 824 F.2d at 705 (information relayed to prison officials through confidential informant who lacked first hand knowledge does not meet evidentiary standards of *Hill*).

In its Memorandum Decision and Order, dated April 19, 1994, this court determined that the conduct report of DOC staff member Mr. Schubert, can be equated with the uncorroborated statement of the confidential informant found insufficient to meet the "some evidence" requirement in *Cato*. *Id*. at 9-10. The fact that Wis. Admin. Code §DOC 303.66 allows a staff member who either observes or hears about a violation to investigate and write a conduct report does not cure the defects in the evidence relied upon. *Id*. at 10. Further, the fact that Wis. Admin. Code §DOC 303.86 does not require that the reporting officer testify does not justify relying on a factually unsupported document.

Response to Plaintiff's Summary Judgment Motion, at 13." (Plaintiff's Brief in Response to Defendant's Motion for Reconsideration, at 6-7).

Defendant Zangl is not entitled to qualified immunity for allegedly violating plaintiff's clearly established rights to a full due process hearing and not to be found guilty without some reliable evidence supporting the finding of guilt.[3]

CONCLUSION

The Wisconsin Administrative Code's repeated use of explicitly mandatory language requiring that certain procedures shall be employed, and that CRC placement will not be terminated absent specified substantive predicates, forces the conclusion that the State has created a protected liberty interest in remaining a CRC placement. Further, because defendant's actions in holding the hearing as a waiver hearing were not "random and unauthorized," the state cannot remedy the deprivation by providing postdeprivation remedies. Moreover, even if defendant's actions were random and unauthorized, available state remedies are inadequate as to plaintiff's termination from CRC placement.

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[3] Defendant contends that inadequacy of evidence at a disciplinary hearing is a procedural, not a substantive due process issue. Citing Superintendent v. Hill, 472 U.S. 445, 454 91985) (revocation of good time does not comport with the minimum requirements of procedural due process unless the findings of the disciplinary board are supported by some evidence). Plaintiff contends that this court's conclusion that defendants violated plaintiff's substantive due process rights by finding him guilty without any reliable evidence is supported by ample authority. Citing, Culbert v. Young, 834 F.2d 624, 630 (7th Cir. 1987) (the procedural due process rights established in Wolff are protected by the substantive requirement that an inmate not be found guilty without some evidence). In its Memorandum Decisions of August 9, 1993 and April 19, 1994, this court concluded that there was insufficient evidence produced at the disciplinary hearing to satisfy substantive due process. Even if the adequacy of the evidence at a disciplinary hearing is correctly characterized as a procedural due process issue, the conclusion that defendant Zangl is not entitled to discretionary immunity is not changed.

Defendant Zangl is not entitled to qualified immunity for allegedly violating plaintiff's clearly established rights to a full due process hearing and not to be found guilty without some reliable evidence supporting the finding of guilt.

ORDER

For the above-stated reasons, defendant Zangl's motion for reconsideration, requesting this court to reconsider its decision of April 19, 1994 regarding the viability of plaintiff's procedural due process claims in light of *Irby v. Macht* is DENIED. Defendant Zangl's alleged violations of plaintiff's procedural due process rights give rise to a claim under 42 U.S.C. §1983. Similarly, defendant Zangl's motion for reconsideration regarding his entitlement to qualified immunity as to plaintiff's 42 U.S.C. §1983 claims is DENIED.

Dated this 29th day of July, 1994.

BY THE COURT:

/s/ Moria Krueger, Judge
Circuit Court, Branch 7

cc: Atty. Stephen J. Nicks, Assistant Attorney General
Atty. Lawrence Bensky

NOTE: At the hearing of July 26, 1994, the trial date was set over to September 19, 1994. Therefore, the previously scheduled final pretrial on August 9, 1994 is canceled and rescheduled to 8:30 a.m., September 1, 1994. On September 1, 1994, proposed verdicts, proposed jury instructions, and any trial briefs are due and must be exchanged.

M.K.

STATE OF WISCONSIN
CIRCUIT COURT, BRANCH VII
COUNTY OF DANE

JAIME SANTIAGO,

Plaintiff,

v. Case No. 92-CV-3906

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL and DENNIS DANNER,

Defendants.

MEMORANDUM DECISION AND ORDER

BACKGROUND

This decision will address and resolve only defendant Dennis Danner's entitlement to immunity.

FACTS

Dennis Danner ("Danner") is a Sector Superintendent for the Division of Intensive Sanctions (DIS) and, in that capacity, handled the appeal of the conduct report issued to plaintiff in this action. As the appellate hearing officer, Danner had a duty to review the hearing record to make sure that the hearing officer's decision was correct and to make sure that the inmate was afforded due process. Danner testified that he has acted as an appellate hearing officer in approximately

ten appeals of due process hearings. (Danner Deposition, at 8). He testified that upon receiving a copy of the appeal, he reviews the supporting documents, including the Conduct Report, any written statements, the Notice of Disciplinary Hearing Waiver Form, the Reasons for the Decision and Evidence Relied On, and the Appeal Form. (*Id.* at 8-10). Danner testified that his role is to make an independent evaluation of the information. (*Id.* at 10).

In making his decision in this case, Danner reviewed the Appeal Form signed by plaintiff, the Conduct Report, and the Reasons for the Decision and Evidence Relied On. (*Id.* at 12-13). He does not recall if he reviewed the Notice of Disciplinary Hearing Waiver Form. (*Id.* at 13-14). Danner affirmed the hearing officer's decision and disposition in its entirety.

DECISION

I. QUALIFIED IMMUNITY.

A. Procedural Due Process Claim – Denial of Right to Full Due Process Hearing.

Danner contends that he is entitled to qualified immunity regarding plaintiff's federal claims against him. Specifically, as to plaintiff's claim that Danner violated his right to a full due process hearing, Danner argues that his conduct was reasonable because plaintiff failed to raise the due process issue on appeal. Further, he argues that even if he had reviewed the waiver form with the erroneous mark in the box waiving a full due process hearing, his conduct was reasonable given the appeal form itself and plaintiff's adoption of the three page statement.

Plaintiff argues that even though he did not raise the procedural due process issue on appeal, Danner had a duty to review the complete record, including the waiver form, to ensure the results of the initial hearing were correct and that plaintiff was afforded all the process he was due. Danner failed to properly evaluate the waiver form and erroneously upheld the waiver hearing, depriving plaintiff of his right to a full due process hearing.

Wisconsin Administrative Code §DOC 303.76(7)(b), provided that "[t]he superintendent *shall* review records and forms pertaining to the appeal. . . ." Danner's deposition testimony confirms that when reviewing an appeal of a conduct report, he conducts an independent review of the supporting documents, including any waivers. Thus, this court's analysis and conclusions regarding defendant Zangl's entitlement to qualified immunity as to plaintiff's procedural due process claim are equally applicable to defendant Danner. (*See* Memorandum Decision and Order, dated July 29, 1994, at 16-18). Plaintiff's right to a full due process hearing, absent an effective waiver, was clearly established twenty years ago in *Wolff v. McDonald*, 481 U.S. 539 (1974). Danner's conduct of affirming Zangl's failure to provide plaintiff with a full due process hearing, absent an effective waiver, was objectively unreasonable. Thus, Danner is not entitled to qualified immunity.

B. Substantive Due Process Claim - Finding of Guilt Without Some Reliable Evidence.

Defendant contends that he is entitled to qualified immunity regarding plaintiff's substantive due process claim. He argues his reliance on the conduct report written by staff member Schubert and admitted into evidence by Zangl, and the plaintiff's own statement, in affirming Zangl's decision was

reasonable. Plaintiff contends that by upholding Zangl's finding of guilt, which was improperly based on the factually deficient conduct report, Danner violated his clearly established right not to be found guilty without some reliable evidence of his guilt.

Again, plaintiff's arguments are persuasive and the analysis of this issue as to Danner is no different than that applied to Zangl. (*See* Memorandum Decision and Order, dated July 29, 1994, at 16-19). Plaintiff's right not to be found guilty without some reliable evidence was clearly established. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985). The conduct report of DOC staff member Schubert can be equated with the uncorroborated statement of a confidential informant found insufficient to meet the "some evidence" standard in *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987). Thus, Danner's conduct of affirming Zangl's finding of guilt without some evidence was objectively unreasonable and, as a result, he is not entitled to qualified immunity.

II. DISCRETIONARY IMMUNITY.

Danner contends that he is entitled to discretionary immunity regarding plaintiff's state claims against him. Specifically, Danner argues that acting as the reviewing magistrate, he exercised discretion in evaluating the merits of plaintiff's appeal. No ministerial function was involved.

Plaintiff contends that Danner is not entitled to discretionary immunity because he negligently performed his ministerial duties to determine whether plaintiff had waived his full due process rights and to determine whether the conduct report was factually sufficient.

A. Evaluation of Waiver Form.

As plaintiff notes, this court has already found that Zangl's evaluation of whether the waiver box had been checked and the meaning of that notation was ministerial. (*See* Memorandum Decision and Order, dated April 19, 1994, at 12). Danner's independent evaluation of whether the waiver box had been checked and the meaning of that notation is no different from that of Zangl. Accordingly, Danner's is not entitled to discretionary immunity for his allegedly negligent performance of this ministerial duty.

B. Determination of the Sufficiency of the Evidence.

Plaintiff argues that the determination of whether there is a factual foundation for the allegations in the conduct report, like the evaluation of the waiver form, is ministerial. However, unless the conduct report is completely devoid of *any* evidence, the evaluation of whether the conduct report contains a sufficient factual foundation involves the exercise of discretion. It involves the exercise of judgment in reviewing and evaluating the evidence contained therein, to determine whether it meets the "some evidence" requirement. Accordingly, Danner is entitled to discretionary immunity regarding plaintiff's state law claim that he was negligent in affirming Zangl's finding of guilt, without some reliable evidence.

ORDER

For the above-stated reasons, defendant Danner's motion to immunity is denied, except with respect to his entitlement to discretionary immunity regarding plaintiff's state law claim that he negligently affirmed Zangl's decision of

guilt. Danner is entitled to discretionary immunity as to only that claim.

Dated this 23rd day of August, 1994.

BY THE COURT:

/s/ Moria Krueger, Judge
Circuit Court, Branch 7

cc: Atty. Stephen J. Nicks, Assistant Attorney General
Atty. Lawrence Bensky

301.046 Community residential confinement.

(1) Institution status. The department shall establish and operate a community residential confinement program as a correctional institution under the charge of a superintendent. Under the program, the department shall confine prisoners in their places of residence or other places designated by the department. The secretary may allocate and reallocate existing and future facilities as part of the institution. The institution is subject to s. 301.02 and is a state prison as defined in s. 302.01. Construction or establishment of the institution shall be in compliance with all state laws except s. 32.035 and ch. 91. In addition to the exemptions under s. 13.48 (13), construction or establishment of facilities for the institution are not subject to the ordinances or regulations relating to zoning, including zoning under ch. 91, of the county and municipality in which the construction or establishment takes place and are exempt from inspections required under s. 301.36.

(2) Inmate, officer and employe status. Inmates confined under sub. (1) are under the care and control of the institution, subject to its rules and discipline and subject to all laws pertaining to inmates of other correctional institutions. Courts may not directly commit persons to the institution under sub. (1). Officers and employes of the institution are subject to the same laws pertaining to other correctional institutions.

(3) Eligibility. The department shall determine those prisoners who are confined under sub. (1). Except as provided in sub. (3m), a prisoner is eligible for this confinement only under all of the following conditions:

(c) The prisoner is not serving a life sentence.

(d) The prisoner is eligible for parole under s. 304.06 (1) (b) or is serving a sentence that is not longer than 3 years.

(3m) Intensive sanctions program participants. The department may confine any intensive sanctions program participant under sub. (1).

(4) Notification. (a) In this subsection:

1. "Member of the family" means spouse, child, sibling, parent or legal guardian.

2. "Victim" means a person against whom a crime has been committed.

(b) Before a prisoner is confined under sub. (1) for a violation of s. 940.03, 940.05, 940.225 (1) or (2), 948.02 (1) or (2), 948.025, 948.06 or 948.07, the department shall make a reasonable effort to notify all of the following persons, if they can be found, in accordance with par. (c) and after receiving a completed card under par. (d):

1. The victim of the crime committed by the prisoner or, if the victim died as a result of the crime, an adult member of the victim's family or, if the victim is younger than 18 years old, the victim's parent or legal guardian.

2. Any witness who testified against the prisoner in any court proceeding involving the offense.

(c) The department shall make a reasonable effort to send the notice, postmarked at least 7 days before a prisoner is confined under sub. (1), to the last-known address of the persons under par. (b).

(d) The department shall design and prepare cards for any person specified in par. (b) to send to the department. The cards shall have space for any such person to provide his or her name and address, the name of the applicable prisoner and any other information the department determines is necessary. The department shall provide the cards, without charge, to district attorneys. District attorneys shall provide the cards, without charge, to persons specified in par. (b). These persons may send completed cards to the department. All department records or portions of records that relate to mailing addresses of these persons are not subject to inspection or copying under s. 19.35(1).

(e) Before a prisoner is confined under sub. (1), the department shall notify the police chief of any community and the sheriff and district attorney of any county where the prisoner will be confined.

(5) Electronic surveillance. The department shall monitor any prisoner's confinement under sub. (1) by the use of an electronic device worn continuously on the prisoner's person or by the confinement of the prisoner in supervised places designated by the department. The department may permit the prisoner to leave confinement for employment, education or other rehabilitative activities.

(5m) Fee. The prisoner shall pay any fee charged under s. 301.135 (3).

(6) Escape. Any intentional failure of a prisoner to remain within the extended limits of his or her confinement or to return within the time prescribed by the superintendent is considered an escape under s. 946.42 (3) (a).

CHAPTER 327
COMMUNITY RESIDENTIAL CONFINEMENT
Note:
Ch. DOC 327 was created as an emergency rule effective January 1, 1990.

327.01 Authority and purpose.

This chapter is promulgated under the authority of ss. 227.11 (2) and301.046 , Stats., to provide rules for administration of community residential confinement for correctional inmates which the department under s. 301.046, Stats., is required to establish and operate. The purposes of community residential confinement placements are:

(1) To provide a structured program for an inmate in institution status placed in the community on electronic monitoring that represents minimal risk to the public, the inmate and staff;

(2) To provide an opportunity for an inmate to assume responsibility in employment, education, treatment and residential settings to prepare the inmate for a productive life in free society after release;

(3) To provide community resources for education, treatment and work programs not available in another institution;

(4) To provide an inmate with opportunities to demonstrate through responsible behavior that the inmate is ready for parole; and

(5) To fulfill the correctional goals of protection of the public and reintegration of the inmate into society.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.02 Applicability.

This chapter applies to the department of corrections and to adult inmates in its custody who are eligible for a minimum security/community residential confinement classification. This chapter and other administrative rules referenced in this chapter are the only administrative rules of the department that apply to inmates in community residential confinement placements. Any inconsistencies between rule provisions within this chapter and other chapters shall be resolved in favor of this chapter.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.03 Definitions.

In this chapter:

(1) "Administrator" means the administrator of the division or that person's designee.

(2) "Community residential confinement placement" or "CRC placement" means an assignment to the department's community residential confinement institution under s. 301.046, Stats., after approval by appropriate CRC staff in accordance with s. DOC 327.06.

(3) "Classification chief" means the division's chief of classification or that person's designee.

(4) "CRC" means community residential confinement or community residential confinement institution.

(5) "Department" means the Wisconsin department of corrections.

(6) "Division" means the department's division of adult institutions.

(7) "Minimum security/community residential confinement classification" or "MS/CRCC" means the inmate security classification described under s. DOC302.12 (1) (f).

(8) "PRC" means the program review committee.

(9) "Secretary" means the head of the department or that person's designee.

(10) "State correctional facility" or "state correctional institution" means the prisons named under s. 302.01, Stats.

(11) "Superintendent" means the superintendent of the department's community residential confinement institution or that person's designee.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.04 Eligibility for minimum security/community residential confinement classification.

To be eligible for minimum security/community residential confinement classification, an inmate shall meet all of the following requirements:

(1) Shall be parole-eligible under s. 304.06, Stats., and s. PAC 1.05.

(2) May not be serving a life sentence.

(3) Shall agree to community residential confinement placement, electronic monitoring and any special condition CRC staff may impose on the placement.

(4) Shall agree to pay a reasonable electronic monitoring fee as determined by the department. The superintendent may waive the electronic monitoring fee.

(5) Shall have a CRC plan that includes an intended residence, either a school or job placement or an alternative acceptable to the PRC and a proposal for meeting treatment goals in the community.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90; correction in (1) made under s. 13.93 (2m) (b) 7, Stats., Register, June, 1994, No. 462.

327.05 Procedure for application and approval of classification.

(1) An inmate may apply for minimum security/community residential confinement classification to his or her institution social worker or to a staff member designated for this purpose.

(2) The application shall include evidence that the inmate satisfies the eligibility requirements under s. DOC 327.04.

(3) The social worker or designated staff member shall review the inmate's application and shall report on the inmate's eligibility and the feasibility of the inmate's plan to the PRC of the state correctional institution where the inmate is assigned.

(4) The program review procedure shall be the procedure for changing a security classification under s. DOC 302.19 and this chapter.

(5) The PRC's recommendation for minimum security/community residential confinement classification shall be by unanimous vote. If a vote is not unanimous, the case shall be treated in accordance with s. DOC 302.19 (7).

(6) Reasons for the PRC's recommendation as to change in the inmate's security classification shall be given to the inmate in writing.

(7) If referred under sub. (5) or s. DOC 302.19 (7), the classification chief shall approve or deny minimum security/community residential confinement classification.

(8) The inmate's eligibility under s. DOC 327.04, the criteria under s. DOC 302.14 and any other factors which relate to whether the inmate will be able to maintain himself or herself in a community residential confinement placement without engaging in criminal or disciplinary activity may be considered in making the decision under this section.

(9) The inmate shall be recommended for minimum security/community residential confinement classification by the PRC and approved for that classification by the classification chief before any further placement efforts are undertaken.

(10) An inmate may appeal a PRC denial of minimum security/community residential confinement classification to the classification chief within 10 days after receipt of notice of the denial.

(11) If the classification chief approves the minimum security/community residential confinement classification, the inmate shall be classified as minimum security/community residential confinement. An inmate with that classification has the appropriate status for CRC placement but is not assigned to a CRC placement unless he or she is approved for placement under s. DOC327.06 . Prior to approval for CRC placement, an inmate with a security classification of minimum security/community residential confinement may be assigned to any correctional institution.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.06 Placement approval.

(1) Upon the classification chief's approval for minimum security/community residential confinement classification, the referring institution's PRC or the classification chief shall send a copy of the CRC plan to a CRC staff person designated by the superintendent.

(2) Upon receipt of the CRC plan, the CRC staff person designated by the superintendent shall carry out an investigation to determine if the plan is appropriate and shall include in that investigation assessments of the inmate's proposed residence, employment, school and community treatment plan.

(3) The designated CRC staff person shall contact the inmate's parole agent for information on the adequacy of the plan, the probable reaction to the inmate in the community where the inmate proposes to reside and other relevant information.

(4) The designated CRC staff member shall document the results of the investigation under subs. (2) and (3) and submit that information to the CRC PRC.

(5) For the purpose of placement approval, the CRC PRC shall consist of 2 members including a social worker and the staff person designated by the superintendent who completed the investigation under subs. (2) and (3). The superintendent may designate persons to sit as alternates.

(6) After reviewing all relevant information, the CRC PRC shall decide whether to approve or deny the CRC placement.

(7) CRC PRC approval for CRC placement shall be by unanimous vote. If the vote is not unanimous, the case shall be referred to the superintendent for decision.

(8) The inmate's eligibility under s. DOC 327.04, the adequacy of the inmate's plan, the criteria under s. DOC 302.14 and any other factors which relate to whether the inmate will be able to maintain himself or herself in a CRC placement without engaging in criminal or disciplinary activity may be considered in making the decision.

(9) If CRC placement is approved, the superintendent may impose in writing any special conditions, such as restrictions on associations or possessions, that are appropriate.

(10) Upon placement approval, the CRC PRC staff shall notify the classification chief. The notification shall include, if applicable:

(a) Date placement is to begin;

(b) Site of residence;

(c) Job, school and treatment plans;

(d) Transportation arrangements between state correctional facility and CRC placement; and

(e) Other information that may be required to prepare for the placement.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.07 CRC placement.

(1) Before the inmate's placement:

(a) A CRC staff person designated by the superintendent shall advise the inmate's employer, appropriate school administrators and persons sharing the residence with the inmate of their responsibilities to the inmate and the program. Other occupants of the residence shall agree in writing to searches of the residence, including the grounds, in accordance with s. DOC 327.21.

(b) The inmate shall sign an agreement to abide by the rules of CRC placement, electronic monitoring and any special conditions imposed on the inmate's placement.

(c) The department shall notify the committing court, the municipal police chief, the county sheriff and district attorney for the area where the inmate plans to reside.

(2) CRC staff and the division's central office staff shall coordinate transportation arrangements between the state correctional facility and the approved CRC placement. The

department is not required to provide transpor- tation to the inmate.

(3) A CRC staff person shall meet with the inmate at the CRC residence to activate the electronic surveillance.

(4) The CRC staff member shall explain to the inmate the rules of CRC placement and the special conditions of the inmate's placement. The CRC staff member shall describe how the electronic monitoring equipment works, any special limitations on transportation methods or routes, the places the inmate is authorized to visit, the hours the inmate is authorized to be absent from his or her residence, and the area designated as the limits of the inmate's confinement.

(5) An inmate in a community residential confinement placement remains in the legal custody of the department and is an inmate in institution status.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.08 Changes in CRC program assignment.

(1) In this section, "program assignment" means assignment to work, school, treatment or an approved alternative program, or to a combination of these. It does not include a more specific assignment, such as a particular job within a work assignment.

(2) For the purposes of considering a change in an inmate's program assignment after initial CRC placement approval under s. DOC 327.06, not including termination of the CRC placement under s. DOC 327.10, a CRC PRC shall consist of 2 members including a social worker and correctional officer. The superintendent may designate persons to sit as alternates.

(3) CRC PRC approval or disapproval for a change in program assignment shall be by unanimous vote. If the vote is not unanimous, the case shall be referred to the superintendent for a decision.

(4) The criteria under s. DOC 302.16, the availability of programs in the community and any other factor relevant to the inmate's rehabilitation and the protection of the community may be considered in making the decision.

(5) Reasons for the decision concerning a program assignment shall be given to the inmate in writing.

(6) An inmate may appeal the PRC's decision concerning a program assignment to the superintendent within 10 days after receipt of the decision.

(7) Although PRC approval is not necessary, an inmate may not change his or her schedule or specific job, school or treatment activities without prior approval by a CRC staff member designated by the superintendent.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.09 Inmate conduct in CRC placements.

(1) The following provisions apply to the conduct of inmates in community residential confinement placements and shall be included in the agreement signed by an inmate under s. DOC 327.07 (2):

(a) An inmate may not possess or use any form of alcohol, or other intoxicating substance as defined under s. DOC 303.02 (11) except as authorized and directed by an approved physician;

(b) An inmate shall abide by all the rules of the inmate's employer or the educational or training facility to which the inmate is assigned;

(c) Except for retaining an attorney, an inmate may not enter into a contract or other agreement without prior approval by the superintendent. Contracts which require prior approval include but are not limited to the purchase of property, time payments and marriage.

(d) An inmate shall abide by this chapter and other rules referenced in this chapter, the specific policies, procedures and rules of any facility in which the inmate is housed, any special conditions imposed on the CRC place- ment, and all pertinent state and federal statutes and local ordinances. In addition, if an inmate is housed in a state correctional institution he or she shall abide by all of the department's administrative rules for institutions;

(e) Any intentional failure of the inmate to return to the CRC residence on schedule or leaving the confines of the authorized area to which he or she is assigned without permission, may be referred for prosecution as an escape under s. 946.42 (3), Stats;

(f) An inmate may not remain in a community residential confinement placement if, as a result, a medical or psychological problem of the inmate would go untreated;

(g) If an inmate is attending school, the inmate shall attend all regularly scheduled classes even if the instructor does not require attendance, unless the inmate obtains an excuse from CRC staff;

(h) If an inmate attending school fails to maintain passing grades in all courses and a cumulative 2 point (2.0) grade point average (C average) or better on a 4 point (4.0) scale or receives one or more incompletes, the PRC may terminate the CRC placement;

(i) Unless approved in advance by CRC staff, an inmate may not enroll in or attend evening courses, courses requiring attendance at events away from the school site, theater activities, field trips, athletic functions or social events;

(j) Inmates shall report all arrests or official police contacts to CRC staff immediately;

(k) Inmates shall submit a schedule of activities to CRC staff as directed by the staff;

(l) Inmates shall make themselves available for tests and searches ordered by CRC staff in accordance with this chapter;

(m) Inmates shall attend and participate in programs and treatment mandated by department staff;

(n) An inmate may not change his or her schedule or CRC program including specific residence, work or treatment situation without prior approval by appropriate CRC staff;

(o) An inmate may not purchase, lease, trade, sell, or operate a motor vehicle without advance approval by CRC staff. To obtain approval to operate a motor vehicle, the inmate shall demonstrate proof of insurance, have a valid Wisconsin driver's license and, if the vehicle is owned by another person, have the permission of the owner to operate the vehicle;

(p) An inmate shall be responsible for maintaining telephone service compatible with the CRC electronic monitoring equipment and CRC programming needs. Personal use of the telephone line may be restricted to allow for proper functioning of the electronic monitoring equipment;

(q) An inmate shall wear an electronic device continuously on the inmate's person and comply with other requirements of the electronic monitoring system as directed by appropriate CRC staff;

(r) An inmate may not tamper with the electronic monitoring equipment. Inmates are responsible for lost, stolen or damaged electronic monitoring equipment, except that inmates are not responsible for malfunctioning of equip- ment caused by faulty manufacturing.

(s) An inmate shall pay a reasonable electronic monitoring fee as determined by the department unless the superintendent waives the fee. Failure of an inmate to make payments on schedule may result in the inmate's termina- tion from a CRC placement. Inmates may not be terminated from a CRC placement solely for failure to pay an electronic monitoring fee; and

(t) An inmate shall acknowledge the department's authority to collect all funds earned and compensation received by the inmate while in a CRC placement and to disburse those funds in accordance with s. DOC 327.15.

(2) All the offenses listed in ss. DOC 303.12 to 303.631 apply to inmates in community residential confinement placement with the following exceptions, substitutions and modifications:

(a) Section DOC 303.15 on sexual conduct does not apply.

(b) The following is substituted for s. DOC 303.18 on inciting a riot: Any inmate who intentionally encourages, directs, commands, coerces or signals one or more other persons to participate in a riot is guilty of an offense. "Riot" means a serious disturbance caused by a group of 2 or more persons which creates a serious risk of injury to persons or property.

(c) Section DOC 303.20 on group resistance and petitions does not apply.

(d) The following is substituted for s. DOC 303.21 on conspiracy:

1. If an inmate plans or agrees to do acts which are forbidden under this chapter with another person or persons, the inmate is guilty of an offense.

2. The penalty for conspiracy may be the same as the penalty for the most serious of the planned offenses;

(e) The following is substituted for s. DOC 303.22 on escape:

1. An inmate who does any of the following without permission is guilty of an offense:

a. Leaves an institution;

b. Leaves the custody of a staff member;

c. Does not follow his or her assigned schedule;

d. Leaves the confines of the authorized area to which he or she is assigned and does not return promptly; or

e. Does not return to the CRC residence on schedule;

(f) The following is substituted for s. DOC 303.27 on lying: Any inmate who knowingly makes a false written or oral statement to a staff member is guilty of an offense;

(g) Section DOC 303.29 on talking does not apply;

(h) Section DOC 303.30 on unauthorized forms of communication does not apply;

(i) The following is substituted for s. DOC 303.32 on enterprises and fraud: Any inmate who offers to buy or orders any item with the intention of not paying for it or incurs debt without permission is guilty of an offense;

(j) Section DOC 303.33 on attire does not apply;

(k) Section DOC 303.40 on unauthorized transfer of property does not apply;

(l) Section DOC 303.42 on possession of money does not apply;

(m) The following is substituted for s. DOC 303.43 on possession of intoxicants:

1. Except as specifically authorized by CRC staff, any inmate who knowingly has in his or her possession any intoxicating substance as defined under s. DOC 303.02 (11) is guilty of an offense; and

2. All intoxicating substances prohibited by this section shall be confiscated, whether or not any violation of this section occurred;

(n) Section DOC 303.46 on possession of excess smoking materials does not apply;

(o) The following is substituted for s. DOC 303.47 on possession of contraband - miscellaneous: Any inmate who knowingly possesses any items of a type which is not allowed under s. DOC 327.16 (6) (c) 1 or 5 or under the inmate's special conditions of CRC placement is guilty of an offense;

(p) Section DOC 303.48 on unauthorized use of the mail does not apply;

(q) The following is substituted for s. DOC 303.49 on punctuality and attendance: Inmates shall attend and be on time for all events, classes, meetings, appointments, jobs and other activities for which they are scheduled. Any inmate who violates this section is guilty of an offense, unless one of the following applies:

1. The inmate is sick and the appropriate CRC staff member has been notified;

2. A CRC staff member has granted the inmate permission to be in some other location; or

3. The inmate has been authorized to change his or her schedule by a CRC staff member;

(r) Section DOC 303.50 on loitering does not apply;

(s) The following is substituted for s. DOC 303.51 on leaving assigned area: Any inmate who leaves an area where he or she is attending a scheduled activity or who leaves the immediate area of a work or school assignment before the activity or the work or school assignment is over is guilty of an offense, unless absence from the assigned area has been approved by an appropriate CRC staff member;

(t) Section DOC 303.52 on entry of another inmate's quarters does not apply;

(u) Section DOC 303.54 on improper storage does not apply;

(v) Section DOC 303.55 on dirty quarters does not apply;

(w) Section DOC 303.56 on poor grooming does not apply;

(x) The following is substituted for s. DOC 303.57 on misuse of prescription medication: Any inmate who knowingly does any of the following is guilty of an offense:

1. Takes more of a prescription medication than was prescribed:

2. Takes a prescription medication more often than was prescribed;

3. Takes a prescription medication which was not prescribed for him or her; or

4. Obtains a prescription for medication without approval by CRC staff.

(y) Section DOC 303.59 on use of intoxicants applies except that subs. (2) (a) and (3) are modified to include tests, examinations and specimens requested in accordance with this chapter; and

(z) The following is substituted for s. DOC 303.63 on violations of institution policies and procedures:

1. The CRC superintendent may make specific substantive disciplinary policies and procedures for inmates in CRC placements. The violation of any specific disciplinary policy or

procedure is an offense. Each inmate in a CRC placement shall be given or mailed a copy of policies and procedures applicable to him or her;

2. Violation of any special conditions imposed on an inmate's CRC placement is an offense; and

3. Violation of the CRC agreement is an offense.

(3) In addition to the rules listed under sub. (1) and the list of offenses under ss. DOC 303.12 to 303.631 as affected by sub. (2), CRC staff may develop additional written rules and specific conditions for an inmate's CRC placement. These specific rules and conditions may be modified at any time with written notice to the inmate.

(4) Violation of this section may result in termination of the CRC placement under s. DOC 327.10.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.10 Termination of CRC placement.

An inmate's CRC placement may be terminated for any of the following reasons:

(1) At the inmate's request, subject to approval of the PRC;

(2) If there is a change of circumstances including a medical condition or the loss of a job, school or treatment program; or

(3) If the department determines that the inmate has committed one or more of the following:

(a) Violation of a state or federal statute or local ordinance;

(b) Violation of the rules of any facility in which the inmate is held or to which the inmate is assigned;

(c) Violation of the administrative rules of the department with the modifications described in s. DOC 327.09;

(d) Violation of the community residential confinement agreement; or

(e) Violation of any special condition imposed on the inmate's CRC placement.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.11 Termination procedure.

(1) For the purpose of considering the termination of a CRC placement, the CRC PRC shall consist of 3 members including a social worker, a correctional officer and a department supervisory staff member. The superintendent may designate persons to sit as alternates.

(2) The procedure for termination at the inmate's request under s. DOC327.10 (1) or as the result of a change in circumstance under s. DOC 327.10 (2) shall be as follows:

(a) The division may transport the inmate to any state correctional institution, a county jail or any other facility that has agreed to hold CRC inmates in lockup status; and

(b) No hearing under s. DOC 327.13 is required. However, the termination shall be subject to PRC approval in accordance with the procedures under sub. (6).

(3) If the placement is terminated under s. DOC 327.10 (3), the inmate shall be afforded a hearing under s. DOC 327.13 for the purpose of determining whether the alleged violation occurred.

(4) Pending the outcome of the hearing or the PRC review under sub. (6), the department may take any action with reference to the inmate that it considers necessary for protection of the public including temporary removal from the CRC placement if the conditions for temporary lockup under s. DOC327.14 are met.

(5) The due process fact-finding hearing shall be conducted in accordance with s. DOC 327.13.

(6) In order to terminate the CRC placement, if the inmate is found under sub. (5) to have committed the violation alleged, the case shall be referred to the CRC PRC for review. The PRC may recommend a termination in the inmate's CRC placement, a change in the inmate's security classification, a transfer or take any other action considered appropriate. PRC review of the inmate's CRC placement shall be conducted in accordance with ss. DOC 302.19 and 302.20.

(7) An inmate who has been removed from a CRC placement pending a hearing and who is found not guilty of the alleged violation shall be returned to the placement as soon as practicable following the determination.

(8) If an inmate is unable to attend work, school or treatment programs due to a pending hearing or PRC review, CRC staff shall notify the appropriate school official, employer or treatment staff.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.12 Discipline.

An inmate in a CRC placement may be disciplined if the department determines, after conducting a hearing under s. DOC 327.13, that the inmate has committed one of the following:

(1) A violation of a state or federal statute or a local ordinance;

(2) A violation of the rules of any facility or program in which the inmate is held or to which the inmate is assigned;

(3) A violation of this chapter;

(4) A violation of the community residential confinement agreement; or

(5) A violation of any special conditions imposed on the inmate's CRC placement.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.13 Disciplinary procedure and penalties.

The due process fact finding hearing to determine if the inmate has committed a violation under s. DOC 327.12 shall be conducted in accordance with the procedures under ss. DOC 303.64 to 303.87, modified as follows:

(1) Any department supervisory staff member may be substituted for the security director or shift supervisor.

(2) Under s. DOC 303.67, on review by the security office, the person who wrote the conduct report shall send it to the department supervisory staff person designated to review conduct reports in his or her area within 24 hours after writing the conduct report. The staff person who is designated to review the conduct report shall review it under s. DOC 303.67 within 24 hours after receipt.

(3) Under s. DOC 303.68 (3), in addition to the listed offenses, the violation of any of the following sections is a major offense: s. DOC 303.43 on possession of intoxicants; s. DOC 303.44 on possession of drug paraphernalia; s. DOC 303.51 on leaving assigned area; and s. DOC 303.511 on being in an unassigned area.

(4) Under s. DOC 303.76 (1) on hearing procedure for major violations, a copy of the approved conduct report shall be given to the inmate within 4 working days after approval under s. DOC 303.67.

(5) Under s. DOC 303.76 (4), the due process hearing may take place at the CRC residence, any state correctional institution, a county jail or other facility designated by the department.

(6) Section DOC 303.78 (1) is modified to read: The superintendent may designate or hire staff members to serve as advocates for inmates in disciplinary hearings at the institution, or staff members may volunteer to serve as advocates. The superintendent shall assign advocates to inmates. If an inmate objects to the assignment of a particular advocate because the advocate has a known and demonstrated conflict of interest in the case, the superintendent shall assign a different staff member to serve as the inmate's advocate.

(7) Under s. DOC 303.81 (3), if an inmate witness must be transported to another institution or facility to testify, the inmate does not have to attend the disciplinary hearing. However, the hearing officer shall attempt to get a signed statement from the witness to be used at the disciplinary hearing or the advocate shall attempt to interview the witness and report on the testimony to the committee in lieu of a personal appearance by the witness.

(8) Under ss. DOC 303.75 (3) and 303.82, any department staff member designated by the superintendent may serve on an adjustment committee or serve as a hearing officer.

(9) A penalty listed in s. DOC 303.84 need not be imposed as a result of a finding of guilt.

(10) Under ss. DOC 303.69 and 303.70, adjustment segregation or program segregation may be served in any state correctional institution, a county jail or other facility designated by the department to hold CRC inmates in adjustment segregation or program segregation status.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.14 Temporary lockup for inmates in CRC placements.

(1) In this section, "TLU" means temporary lockup.

(2) An inmate may be placed in TLU by any CRC staff member or by a law enforcement officer at the request of CRC staff.

(3) CRC supervisory staff shall review the placement of an inmate in TLU within 3 working days after it takes place. Before this review and the review provided for in sub. (3), the inmate shall be provided with the reason for TLU and with an

opportunity to respond, either orally or in writing. Review of the decision shall include consideration of the inmate's response to TLU. If, upon review, it is determined that TLU is not appropriate, the inmate shall be returned to his or her CRC placement.

(4) No inmate may remain in TLU more than 21 days, except that the superintendent, with notice to the administrator, may extend this period for up to 21 additional days for cause. After the review under sub. (2), CRC supervisory staff shall review the status of each inmate in TLU every 7 days to determine whether TLU continues to be appropriate. If upon review it is determined that TLU is not appropriate, the inmate shall be returned to his or her CRC placement.

(5) An inmate may be placed in TLU and kept there only if the decision maker is satisfied that it is more likely than not that one or more of the following is true:

(a) If the inmate remains in the CRC placement, the inmate will seek to intimidate a witness in a pending investigation, disciplinary action or termination action;

(b) If the inmate remains in the CRC placement, the inmate will encourage others by example, expressly, or by the inmate's presence, to defy staff authority and thereby erode staff's ability to control a particular situation;

(c) If the inmate remains in the CRC placement, it will create a substantial danger to the physical safety of the inmate or other person;

(d) If the inmate remains in the CRC placement, there is a substantial danger that the inmate will try to escape;

(e) If the inmate remains in the CRC placement, a criminal, disciplinary or termination investigation will thereby be inhibited; or

(f) If the inmate remains in the CRC placement, a medical or psychological problem of the inmate would go untreated.

(6) When an inmate is placed in TLU, the person who makes the placement shall state the reasons on the appropriate form and shall include the facts upon which the decision is based. The inmate shall be given a copy of the form. Upon review, the supervisory staff person shall indicate on the form approval or disapproval of TLU.

(7) TLU for CRC inmates may be at any state correctional institution, a county jail or any other facility designated by the department for holding CRC inmates in TLU status. If 1983 Wis. Act 528 does not apply to the inmate, he or she shall continue to earn extra good time credit. The inmate may be required to wear mechanical restraints, as defined in s. DOC 306.09 (1), while outside the cell.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.15 Inmate funds.

(1) An inmate in a CRC placement is not eligible for compensation under s. DOC 309.55.

(2) The inmate shall sign an agreement acknowledging the department's authority to collect all funds earned and compensation received by the inmate while in a CRC placement and to disburse those funds in accordance with this section. Refusal to sign shall make an inmate ineligible for participation.

(3) The CRC business manager or a financial institution designated to handle CRC inmate accounts shall establish a separate CRC account for each inmate and make disbursements in accordance with this section. All paychecks from CRC work assignments and other funds received for inmates shall be sent to the CRC business manager or a financial institution designated to handle CRC inmate accounts.

(4) Upon an inmate's placement in CRC, funds in an inmate's general account shall be transferred to his or her CRC account.

(5) The CRC business manager or the designated financial institution shall disburse money received while an inmate is in a CRC placement in the following order:

(a) Payment of the crime victim and witness assistance surcharge under s.973.045 (4), Stats., and s. DOC 309.465;

(b) Unless waived by the superintendent, a reasonable electronic monitoring fee as determined by the department; and

(c) The balance to the inmate in a CRC placement, consistent with CRC procedures.

(6) Prior to disbursing funds under sub. (5) (c), the business manager or designated financial institution may disburse money from the inmate's CRC account to pay, either in full or proportionately, the inmate's obligations that have been acknowledged by the inmate in writing or that have been reduced to judgment.

(7) Income earned by or received for the benefit of an inmate while in a CRC placement is not subject to release account deductions under s. DOC 309.466.

(8) After approval for a CRC placement, an inmate may receive a single disbursement from his or her release account under s. DOC 309.466 for initial expenses such as security deposits, clothing, fees, tuition and books, if approved by the superintendent.

(9) Upon termination of a CRC placement, funds in an inmate's CRC account shall be deposited in the inmate's general account after disbursements under sub. (5) (b) are made.

(10) Before releasing an inmate to field supervision from a CRC placement, the CRC business manager shall inform the parole agent of the balance in the inmate's CRC account. The agent shall instruct the business manager as to where the funds shall be transferred. Following release, the former inmate may use funds formerly held in the CRC account with the approval of the agent.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.16 Resources for CRC inmates.

(1) Disclaimer. The department does not assume responsibility for the condition or safety of any CRC residence, including the inmate's food and property at the residence, or for the safety of others or their property at a CRC residence.

(2) Access to legal materials. Inmates with documented legal needs shall be permitted to do legal research at local law libraries. If local law libraries are not available, efforts shall be made to accommodate reasonable requests of inmates for legal materials by borrowing copies of requested materials from the criminal justice reference and information center at the university of Wisconsin law school or from correctional institution law

libraries. CRC staff shall inform inmates how legal materials may be obtained. An inmate, at his or her request, may be transferred from a CRC placement to an institution with a law library if the inmate requires access to a library and materials made available pursuant to this subsection are inadequate.

(3) Medical care.
(a) All medical care for inmates shall be authorized by the superintendent upon recommendation of correctional health services staff in accordance with this subsection.

(b) Inmates with private health insurance may use any medical personnel and facilities covered by their policy with prior approval of the superintendent and correctional health services staff.

(c) Inmates without private health insurance may be required to use department facilities for ordinary medical and dental care.

(d) For emergency medical care, an inmate shall use a facility in the area approved by the department for emergency medical care. All emergency medical care requires the superintendent's prior authorization unless this is not possible because of the nature and time limitation of the emergency.

(e) An inmate requiring hospitalization for nonemergency medical care shall use a facility in the area approved by the department for hospitalization of CRC inmates. All nonemergency hospitalizations require the prior approval of the superintendent and correctional health services staff.

(f) An inmate's serious medical care need may be cause for termination of a CRC placement under s. DOC 327.10 and transfer to a state facility for treatment.

(4) Religious services. With the approval of the superintendent, inmates motivated by religious beliefs shall be given reasonable opportunities to attend religious services.

(5) Leisure time activities.
(a) In this subsection, "leisure time activities" mean activities outside the inmate's residence other than those required for job, school or treatment programs and include, but are not limited to, attending religious services, access to law libraries, exercise and recreational activities.

(b) After 30 days of being in a CRC placement, an inmate shall be permitted to participate in leisure time activities for at least 4 hours per week. The 30 day waiting period may be waived by the superintendent.

(c) A request to participate in a leisure time activity shall be made by an inmate in writing to the appropriate CRC staff member. All leisure time activities shall have prior approval by the appropriate CRC staff member and shall be included in the inmate's schedule.

(d) An inmate may lose the privilege of participating in leisure time activities through the disciplinary process under s. DOC 327.13.

(6) Property.
(a) Inmates may have personal property in their possession or in their residence in accordance with this subsection and any special conditions imposed on an inmate's CRC placement.

(b) An inmate's property shall be signed out to him or her at the sending correctional institution prior to placement in CRC. The department is not responsible for an inmate's property after that point.

(c) An inmate in a CRC placement may possess any personal property except:

1. Property which is prohibited by state, federal or local law or this chapter;

2. Alcohol beverages as defined in s. 125.02 (1), Stats., or a controlled substance as defined in s. 161.01 (4), Stats.;

3. Any item designed exclusively to be used as a weapon or to be used in the manufacture of a weapon;

4. Drug paraphernalia, as defined in s. DOC 303.44; and

5. Obscene material, as defined in s. DOC 309.05 (6) (c) 8.

6. Property which is prohibited by an inmate's special conditions of CRC placement.

(d) Items not permitted under this section or under an inmate's special conditions of CRC placement are contraband. They may be seized in accordance with s. DOC 303.10. An inmate may be subject to discipline for possessing contraband.

(7) Inmate contacts.
(a) Special conditions may be placed on an inmate's contacts while in a CRC placement, including mail, visits and telephone, if it is warranted by the rehabilitation of the inmate or the protection of the public.

(b) An inmate shall inform the superintendent of any contact with the news media.

(c) Visits between inmates who are family members shall be regulated under s. DOC 309.15.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.17 Use of force.

The use of force on inmates in CRC placements shall comply with s. DOC 306.06, modified as follows:

(1) In addition to the conditions for use of non-deadly force under s. DOC 306.06 (3), non-deadly force may be used by correctional staff against a CRC inmate if the user of force reasonably believes it is necessary to prevent the inmate from fleeing the control of the correctional staff member;

(2) Deadly force may not be used by CRC staff against a CRC inmate except to prevent death or great bodily injury to oneself or another; and

(3) If the CRC inmate is held in a state correctional institution, the use of force rules under ch. DOC 306 apply.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.18 Mechanical restraints.

(1) This section regulates the use of mechanical restraints on inmates in CRC placements.

(2) Mechanical restraints are limited to handcuffs, handcuffs with restraining belt or chain, restraining chain, leg restraints, and leather and plastic restraints.

(3) Mechanical restraints may be used only in the following circumstances:

(a) To protect staff or others from a CRC inmate who poses an immediate risk of flight or physical injury to others unless restrained;

(b) To protect a CRC inmate who poses an immediate threat of physical injury to himself or herself unless restrained;

(c) When taking a CRC inmate into custody; or

(d) To transport a CRC inmate.

(4) Mechanical restraints may not be used:

(a) As a method of punishment;

(b) About the head or neck of an inmate;

(c) In a way that causes undue physical discomfort, inflicts physical pain or restricts the blood circulation or breathing of the inmate; or

(d) To restrain an inmate to a moving vehicle.

(5) A staff member shall observe a CRC inmate in restraints at least once every 15 minutes until the restraints are removed or the inmate is admitted to a state correctional institution, a detention facility, a mental health facility or a medical facility.

(6) If feasible, an inmate shall be released from restraints to perform bodily functions and for meals.

(7) Except when restraints are used to take a CRC inmate into custody or to transport an inmate, a record shall be kept of each time the inmate is placed in restraints. The record shall include:

(a) The inmate's full name, number, and the date and time the inmate was placed in restraints;

(b) The name of the staff member who placed the inmate in restraints;

(c) The reason for placing the inmate in restraints; and

(d) A statement indicating when and under what circumstances the restraints were removed.

(8) CRC staff shall periodically examine the supply of mechanical restraints. Any excessively worn or defective restraints shall be removed from the supply. Only commercially manufactured mechanical restraints may be used.

(9) If the CRC inmate is held in a state correctional institution, the mechanical restraints rules under ss. DOC 306.09 and 306.10 apply.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.19 Chemical agents and firearms.

(1) Chemical agents may not be used by CRC staff against CRC inmates.

(2) CRC staff may not carry firearms or other weapons during their working hours.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.20 Escapes.

(1) Plan. The superintendent shall have a written plan to be implemented if an escape occurs from a CRC placement. The plan shall be developed by the superintendent who shall review and update it annually. A copy of the plan shall be filed with the administrator. The plan shall provide for the following:

(a) If CRC staff believe that an inmate may have escaped because the inmate has left an assigned area, the inmate does not return to the CRC residence on schedule, the electronic monitoring equipment indicates someone has tampered with it or because CRC staff have received other relevant information, CRC staff shall attempt to contact the inmate.

(b) If CRC staff believe the inmate has escaped or if an inmate is 4 or more hours late returning to the CRC residence without authorization from appropriate CRC staff, CRC staff shall place an apprehension request on the inmate;

(c) After an apprehension request has been placed on an inmate, the escape shall be reported orally and in writing to the superintendent and the administrator;

(d) The escape shall be reported to law enforcement officials; and

(e) The administrator and law enforcement agencies shall be notified by CRC staff when an inmate who has escaped is apprehended.

(2) Reports of escapes. Reports of escapes required to be made under sub. (1) shall include, if known:

(a) The method of escape;

(b) Who was involved in the escape;

(c) A description of the escapee, including clothing worn;

(d) Action taken by the institution;

(e) A brief evaluation of the factors which may have contributed to the escape; and

(f) The identification of persons who may have information about the escape.

(3) Order to duty. In the event of an escape, the superintendent may order any off-duty staff member to work.

(4) Authority of hostage. If a correctional staff member, including the superintendent, is taken as a hostage in an escape or escape attempt, that hostage has no authority to order any action or inaction by correctional staff. Any orders issued by a hostage shall be disregarded by the correctional staff.

(5) Pursuit. The pursuit of escapees shall be done under the supervision of local law enforcement authorities. Until local law enforcement authorities are able to supervise a pursuit, it shall be supervised by the superintendent. Correctional staff and law enforcement officers may take a CRC inmate into custody from his or her CRC residence.

(6) Use of private cars in pursuit. The superintendent may authorize CRC staff members to use their own cars to pursue escapees if state-owned cars are unavailable.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.21 Search of CRC residence.

(1) A search of a CRC inmate's residence, including the grounds, his or her vehicle, areas occupied by other occupants of the residence or any property under the inmate's control, may be made at any time by any correctional staff member. There is no requirement that there be evidence that contraband is concealed in the residence before a search is conducted.

(2) Before the search occurs, it shall be approved by a CRC supervisor unless exigent circumstances, such as suspicion the inmate will destroy contraband or use a weapon, require search without approval.

(3) There shall be a written record of all searches conducted under sub. (1). This record shall be prepared by the CRC supervisor or the staff member who conducted the search. The report shall state:

(a) The identity of the staff member who conducted the search and the supervisor who approved it;

(b) The date and time of the search;

(c) The identity of the inmate whose residence or property was searched;

(d) The reason for conducting the search. If the search was a random one, the report shall state that fact;

(e) Any objects which were seized pursuant to the search; and

(f) Whether any damage was done to the premises during the search.

(4) If any objects were seized or property damaged during the search of an inmate's residence or property, the inmate shall be informed in writing. The inmate shall be reimbursed for damage to any property which is not contraband. Property which is damaged shall be valued at its fair market value, not the cost to replace it.

(5) In conducting a search, correctional staff shall disturb the effects of the inmate as little as possible, consistent with thoroughness.

(6) Staff shall not read legal materials belonging to the inmate during a search.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.22 Search of CRC inmate.

(1) Searches of inmates approved for CRC placements shall comply with s. DOC 306.16, modified as follows:

(a) In addition to the reasons for a personal search of an inmate listed under s. DOC 306.16 (2), a personal search of an inmate in a CRC placement may be conducted by any correctional staff member before an inmate enters and after an inmate leaves the security enclosure of a jail or detention facility and when an inmate is taken into custody;

(b) In addition to the reasons for a strip search of an inmate listed under s. DOC 306.16 (3), a strip search may be conducted before an inmate enters and after an inmate leaves the security enclosure

of a jail or detention facility and when an inmate is taken into custody;

(c) In addition to the reasons for a body contents search listed under s. DOC 306.16 (5), a body contents search may be conducted:

1. Immediately before transfer to the CRC placement;

2. Upon arrival at the CRC placement;

3. If an inmate is found to possess intoxicating substances or intoxicating substances are detected or found in the inmate's residence or in an area controlled, occupied or inhabited by the inmate;

4. As part of a random testing program of all CRC inmates. Selection of inmates for random testing may not be done for the purpose of harassing or intimidating inmates; or

5. Periodically, if an inmate has a history of alcohol or other drug abuse.

(2) If the CRC inmate is held in a correctional institution, the search rules under ss. DOC 306.13, 306.14, 306.15 and 306.16 apply.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.23 Search of staff.

Section DOC 306.18 regulates the search of CRC staff except that a search is authorized before and after a staff member has

contact with a CRC inmate or if there are reasonable grounds to believe the staff member is concealing an unauthorized object.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.24 Use of test results and contraband as evidence at disciplinary hearings.

(1) Contraband seized during a search which is done in violation of this chapter may be used as evidence at a disciplinary hearing conducted pursuant to s. DOC 327.13.

(2) Results of physical examinations and tests performed on body content specimens for the purpose of detecting intoxicating substances may be used as evidence at a disciplinary hearing conducted pursuant to s. DOC 327.13.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.25 Emergencies.

(1) An emergency is an immediate threat to the safety of CRC staff, inmates or the public. An emergency may include, but is not limited to:

(a) Failure of the CRC inmate's electronic surveillance equipment;

(b) Malfunctioning of the CRC inmate's telephone system; or

(c) A strike of department employes.

(2) The superintendent shall have a written plan to be implemented in the event of an emergency that complies with the requirements of s. DOC 306.23 (2) and (3).

(3) If an emergency occurs that prevents the normal functioning of CRC, the superintendent may suspend those sections of this chapter or other administrative rules to which this chapter refers that specifically relate to the emergency until the emergency is ended.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90.

327.26 Other rules that apply to CRC placements.

The following chapters apply to inmates in community residential confinement placements:

(1) Chapter PAC 1 on parole;

(2) Chapter DOC 310 on complaint procedures in adult correctional institutions, modified as follows:

(a) Under s. DOC 310.08 (2), the complaint shall be considered denied and may be appealed if the superintendent does not send his or her decision to the complainant within 23 calendar days after the ICI's receipt of the complaint; and

(b) Under s. DOC 310.03 (2), the superintendent may designate a CRC staff member to function as ICI in addition to other duties. Complaint investigation does not have to be the primary responsibility of this person;

(3) Chapter DOC 314 on mental health treatment for inmates;

(4) Chapter DOC 325 on temporary release under supervision; and

(5) Chapter DOC 326 on leave for qualified inmates.

History
Cr. Register, September, 1990, No. 417, eff. 10-1-90; correction in (1) made under s. 13.93 (2m) (b) 7, Stats., Register, June, 1994, No. 462.

303.63 Violations of institution policies and procedures.
Double click to select this section for viewing or printing

(1) Each institution may make specific substantive disciplinary policies and procedures relating to:

(a) Visiting, including no-contact visiting;

(b) Recreation;

(c) Smoking;

(d) Movement within and outside the institution;

(e) Attire;

(f) Personal property;

(g) The use of institution facilities;

(h) Talking;

(i) Sale of craft items;

(j) Authorized enterprises; and

(k) Reporting illness or injury.

(2) Violations of any specific policies or procedures authorized under sub. (1) are offenses.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; am. (1) (d) and r. (3), Register, April, 1985, No. 352, eff. 5-1-85; am. (1) (a), Register, April, 1994, No. 460, eff. 5-1-94.

SUB CHAPTER X
Disciplinary Procedure And Penalties

303.64 Disciplinary violations–possible dispositions.

A violation of ss. DOC 303.12 to 303.63 may be dealt with in the following ways:

(1) If a conduct report is not required, the inmate may be counseled and warned. Disposition in this manner is governed by s. DOC 303.65.

(2) A minor violation may be disposed of summarily. Disposition in this manner is governed by s. DOC 303.74.

(3) The violation may be referred to the security supervisor in writing by a conduct report. See s. DOC 303.66. Violations referred to the security supervisor may be dealt with as follows:

(a) The security supervisor may dismiss, alter or correct the report. See s. DOC 303.67.

(b) If the violation is a minor one, the security supervisor shall refer the matter to a hearing officer to be disposed of in accordance with s. DOC303.75 .

(c) If the violation is a major one, the security supervisor shall refer the matter to a hearing officer to be disposed of in accordance with ss. DOC303.76 to 303.84 .

(4) Violations of the criminal law may be referred to the sheriff for further investigation and to the district attorney for prosecution. See s. DOC303.73 .

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80.

303.65 Offenses that do not require a conduct report.

(1) Staff members are not required to make official conduct reports on all observed violations of the disciplinary rules. Under any of the following conditions, the officer may merely inform the inmate that his or her behavior is against the rules and discuss the inmate's behavior and give a warning if:

(a) The inmate is unfamiliar with the rule;

(b) The inmate has not violated the same or a closely related rule recently (whether or not a conduct report was made);

(c) The inmate is unlikely to repeat the offense if warned and counseled;

(d) Although the inmate's acts were a technical violation of a rule, the purposes of this chapter would not be served by writing a conduct report in the particular situation.

(2) An offense which is always considered major, in accordance with s. DOC 303.68, may not be disposed of in accordance with this section. A conduct report must be written if a major offense occurs.

(3) No official report of dispositions in accordance with sub. (1) is required.

(4) The security director may strike a charge if he or she believes a conduct report is inappropriate, in accordance with s. DOC 303.67. The decision by the security director not to strike or to

strike is not reviewable by the hearing officer, adjustment committee or superintendent.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80.

303.66 Conduct report.

(1) Except under the conditions described in s. DOC 303.65, any staff member who observes or finds out about a rule violation shall do any investigation necessary to assure himself or herself that a violation occurred, and if he or she believes a violation has occurred, shall write a conduct report. If more than one staff member knows of the same incident, only one of them shall write a conduct report.

(2) In the conduct report, the staff member shall describe the facts in detail and what other staff members told him or her, and list all sections which were allegedly violated, even if they overlap. Any physical evidence shall be included with the conduct report.

(3) There should be only one conduct report for each act or transaction that is alleged to violate these sections. If one act or transaction is a violation of more than one section, only one conduct report is necessary.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80.

303.67 Review by security office.

(1) Each working day, the security director shall review all conduct reports written since the previous working day.

(2) Conduct reports which resulted in summary disposition must be reviewed and approved prior to entry in any of the inmate's records.

(3) Conduct reports should be reviewed for the appropriateness of the charges.

(a) The security director may dismiss a conduct report if he or she believes that, according to s. DOC 303.65, it should not have been written.

(b) The security director shall strike any section number if the statement of facts could not support a finding of guilty of violating that section.

(c) The security director may add any section number if the statement of facts could support a finding of guilty of violating that section and the addition is appropriate.

(d) If no section numbers remain, a conduct report must be destroyed.

(e) The security director may refer a conduct report for further investigation.

(4) The security director shall divide all remaining conduct reports into major and minor offenses.

(a) Minor offenses shall be disposed of in accordance with s. DOC 303.75.

(b) Major offenses and conduct reports charging both major and minor offenses shall be disposed of in accordance with ss. DOC 303.76 to 303.84.

(5) Following the review described in this section, the security director shall sign all reports he or she has approved.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80.

303.68 Major and minor penalties and offenses.

(1) (a) A "major penalty" is adjustment segregation as defined in ss. DOC303.69 and 303.84, program segregation as defined in ss. DOC 303.70 and 303.84, loss of earned good time or extension of mandatory release date under s. DOC303.84 , or all 3 where imposed as a penalty for violating a disciplinary rule. Any minor penalty may be imposed for a violation where a major penalty could be imposed. Restitution may be imposed in addition to or in lieu of any major penalty.

(b) A "minor penalty" is a reprimand, loss of recreation privileges, building confinement, room confinement, loss of a specific privilege, extra duty, and restitution in accordance with ss. DOC 303.72 and 303.84. Restitution may be imposed in addition to or in lieu of any other minor penalty.

(c) A "major offense" is a violation of a disciplinary rule for which a major penalty may be imposed if the accused inmate is found guilty.

(d) A "minor offense" is any violation of a disciplinary rule which is not a major offense under sub. (3) or (5) or which the security director has not classified as a major offense.

(2) Except for an offense listed under sub. (3) or covered by sub. (5), an offense is neither a major nor a minor offense until the security director classifies it as major or minor.

(3) Any violation of the following sections is a major offense:

Section	Title
DOC 303.12	Battery
DOC 303.13	Sexual assault -- intercourse
DOC 303.14	Sexual assault -- contact
DOC 303.18	Inciting a riot
DOC 303.19	Participating in a riot
DOC 303.22	Escape
DOC 303.23	Disguising identity
DOC 303.37	Arson
DOC 303.41	Counterfeiting and forgery
DOC 303.45	Possession, manufacture and alteration of weapons
DOC 303.57	Misuse of prescription medication
DOC 303.59	Use of intoxicants

(4) An alleged violation of any section other than ones listed in sub. (3) may be treated as either a major or minor offense. The security director shall decide whether it should be treated as a major or minor offense, if the offense has not been disposed of summarily in accordance with s. DOC 303.74. In deciding whether an alleged violation should be treated as a major or minor offense, the security director shall consider the following criteria and shall indicate in the record of disciplinary action the reason for the decision based on these criteria:

(a) Whether the inmate has previously been found guilty of the same or a similar offense, how often, and how recently;

(b) Whether the inmate has recently been warned about the same or similar conduct;

(c) Whether the alleged violation created a risk of serious disruption at the institution or in the community;

(d) Whether the alleged violation created a risk of serious injury to another person; and

(e) The value of the property involved, if the alleged violation was actual or attempted damage to property, misuse of property, possession of money, gambling, unauthorized transfer of property, soliciting staff or theft.

(5) Any conduct report containing at least one charge of a major offense shall be handled as a major offense, even if it also includes minor offenses.

(6) Any alleged violation of a rule which may result in a suspension of visiting or correspondence privileges, work or study release, or leave or which may result in imposition of no-contact visiting shall be treated as a major offense, although the inmate may waive this.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; am. (1) (d), renum. (2) to (5) to be (3) to (6) and am. (4) (intro.), cr. (2), Register, April, 1985, No. 352, eff. 5-1-85; am. (1) (a), Register, February, 1987, No. 374, eff. 3-1-87; am (6), Register, April, 1994, No. 460, eff. 5-1-94.

303.69 Major penalties: adjustment segregation.

(1) Conditions. Adjustment segregation may not exceed 8 days. It may only be imposed for a major offense by the adjustment committee or the hearing officer. Only one person shall be kept in each segregation cell, except when overcrowding prevents it. Each cell must meet the following minimum standards: clean

mattress, sufficient light to read by at least 12 hours per day, sanitary toilet and sink, and adequate ventilation and heating.

(2) Necessities. The following shall be provided promptly upon request for each inmate in adjustment segregation but may not necessarily be kept in the cell: adequate clothing and bedding; a toothbrush, toothpaste, soap, a towel, a face cloth and a small comb, unless the inmate is allowed to use his or her own such hygiene supplies; paper, envelopes, stamps and pens (the cost of stamps may be deducted from the inmate's account); and holy books. The same diet as provided to the general population at the institution shall be provided.

(3) Other property. Inmates in adjustment segregation may have material pertaining to legal proceedings and books provided by the institution librarian in adjustment segregation.

(4) Visits and telephone calls. Inmates in adjustment segregation shall be permitted visitation, including no-contact visiting, and telephone calls in accordance with ch. DOC309 .

(5) Mail. Inmates in adjustment segregation may receive and send mail in accordance with the departmental rules relating to inmate mail.

(6) Showers. Inmates in adjustment segregation shall be permitted to shower at least once every 4 days.

(7) Special procedures. No property is allowed in the cell except that described in subs. (1), (2) and (3), and letters received while in adjustment segregation. Smoking is forbidden. Each institution may establish specific procedures relating to talking. No yelling or whistling is permitted.

(8) Leaving cell. Inmates in adjustment segregation may not leave their cells except for urgent medical or psychological attention, showers, visits and emergencies endangering their safety in the cell. They may be required to wear mechanical restraints, as defined in s. DOC 306.09 (1), while outside their cells if the superintendent or designee determines that the use of mechanical restraints is necessary to protect staff or inmates or to maintain the security of the institution.

(9) Good time. An inmate shall not earn extra good time while he or she is in adjustment segregation. Wages are not paid to inmates in adjustment segregation.

(10) Observation. A person placed in observation while in adjustment segregation receives credit toward the penalty being served.

(11) Transfer. An inmate may be transferred from one institution to another while in adjustment segregation in accordance with ch. DOC 302.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; emerg. am. (8), eff. 11-18-85; am. (8), Register, May, 1986, No. 365, eff. 6-1-86; am. (4), Register, April, 1994, No. 460, eff. 5-1-94.

303.70 Major penalties: program segregation.

(1) Conditions. Program segregation may not exceed the period specified in s. DOC303.84 . It may only be imposed for a major offense by the adjustment committee or the hearing officer. Only one person shall be kept in each segregation cell, unless overcrowding prevents it. Each cell must meet the following minimum standards: clean mattress, sufficient light to read by at

least 12 hours per day, sanitary toilet and sink and adequate ventilation and heating.

(2) Necessities. The following shall be provided promptly upon request for each inmate in program segregation: adequate clothing and bedding; a toothbrush, toothpaste, soap, a towel, a face cloth and a small comb, unless the inmate is allowed to use his or her own such hygiene supplies; paper, envelopes, stamps and pens (the cost of stamps may be deducted from the inmate's account); and holy books. The same diet as provided to the general population at the institution shall be provided.

(3) Property.
(a) Inmates in program segregation may have in their cells documents and other materials pertaining to legal proceedings as well as books provided by the institution librarian.

(b) Inmates in program segregation may not have electronic equipment or typewriters in their cells except as permitted in accordance with written policy of the institution. Every institution shall have a written policy providing for incentives for inmates in program segregation to earn the privilege of having personal electronic equipment or typewriters in program segregation. The administrator shall approve each institution's policy before it takes effect to ensure that it is reasonable. Each institution shall post its approved policy and implementation procedures within 30 days after January 1, 1985.

(c) This subsection applies to all program segregation status imposed for conduct committed before, on or after January 1, 1985.

(4) Visits and telephone calls. Inmates in program segregation shall be permitted visitation, including no-contact visiting, and telephone calls in accordance with ch. DOC 309.

(5) Mail. Inmates in program segregation may receive and send mail in accordance with departmental rules relating to mail.

(6) Showers. Inmates in program segregation shall be permitted to shower at least once every 4 days.

(7) Services and programs. Social services, clinical services and program and recreation opportunities shall be provided as possible but must be provided at the individual's cell, unless otherwise authorized by the security director. A program of exercise shall be provided for inmates in program segregation.

(8) Leaving cell. Inmates in program segregation may not leave their cells except for medical or clinical attention, showers, visits, exercise and emergencies endangering their safety in the cell. They may be required to wear mechanical restraints, as defined in s. DOC 306.09 (1), while outside their cells if the superintendent or designee determines that the use of mechanical restraints is necessary to protect staff or inmates or to maintain the security of the institution.

(9) Good time and pay. Inmates in program segregation earn neither extra good time nor compensation.

(10) Canteen. Inmates in program segregation may have approved items brought in from the canteen but may not go to the canteen in person.

(11) Special rules. Smoking is permitted if no hazard is thereby caused. Talking is permitted in a normal tone during approved times. No yelling or whistling is permitted.

(12) Review of program segregation. An inmate's status in program segregation may be reviewed at any time and he or she

may be placed in the general population at any time by the superintendent. Such status must be reviewed every 30 days by the superintendent. Such review shall include a recommendation by the security director as to whether the inmate should remain in program segregation and an evaluation of the inmate by either the crisis intervention officer or the adjustment program supervisor, or both. In deciding whether an inmate should be removed from program segregation and placed in the general population, the superintendent shall consider:

(a) The offense, including:

1. Its nature and severity;

2. Mitigating factors;

3. Aggravating factors; and

4. Length of sentence to program segregation;

(b) Motivation and behavior of the inmate, including:

1. Attitude toward himself or herself and others and changes in his or her attitude;

2. Goals of the inmate;

3. Physical and mental health; and

4. Attempt to resolve emotional and mental disorders;

(c) Institutional adjustment, including:

1. Disciplinary record;

2. Program involvement;

3. Relationship to staff and inmates; and

4. Security problems created by release;

(d) Programs, including:

1. Social and clinical services available to help the inmate; and

2. Any programs available to help the inmate.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; emerg. r. and recr. (3), eff. 7-24-84; r. and recr. (3) and (10), Register, December, 1984, No. 348, eff. 1-1-85; emerg. am. (8), eff. 11-18-85, am. (8), Register, May, 1986, No. 365, eff. 6-1-86; am. (4), Register, April, 1994, No. 460, eff. 5-1-94.

303.71 Controlled segregation.

(1) Use. Any inmate in TLU or segregation of any kind who exhibits loud and seriously disruptive behavior or destructive behavior toward the contents of the cell or himself or herself may be put into controlled segregation upon order of the shift supervisor. No inmate may be placed in controlled segregation unless a conduct report is written for the conduct giving rise to the use of controlled segregation. The adjustment committee shall review the report to determine if disciplinary action is appropriate. Controlled segregation normally lasts for not more than 72 hours for a single inmate, but the security director may extend the placement for uncontrollable behavior. Extensions shall be reviewed every 24 hours. When the behavior is brought under control, the inmate shall be removed from this status.

(2) Conditions. Only one person shall be kept in each segregation cell, except in emergencies. Each cell must meet the following minimum standards: clean mattress, sufficient light to read by for at least 12 hours per day, sanitary toilet and sink and adequate ventilation and heating.

(3) Necessities. The following shall be provided for each inmate in controlled segregation: adequate clothing, essential hygiene supplies upon request, and the same diet as provided to the general population. While an inmate is acting in a disruptive manner, close control of all property shall be maintained.

(4) Visits. Inmates in controlled segregation may not receive visits, including no-contact visits, except from their attorney or with permission from the security director.

(5) Mail. Inmates in controlled segregation may receive and send mail in accordance with departmental rules relating to mail. Correspondence materials may be provided if they do not pose a threat to anyone.

(6) Special rules.
(a) No property is allowed in the cell except that described in subs. (2) and (3), letters received while in controlled segregation and legal materials. Smoking is forbidden. Talking is permitted in a normal tone. No yelling or whistling is permitted.

(b) Inmates in controlled segregation may not leave their cells except in emergencies endangering the inmate's safety in the cell or with permission from the security director or designee. They may be required to wear mechanical restraints, as defined in s. DOC 306.09 (1), while outside their cells if the superintendent or designee determines that the use of mechanical restraints is necessary to protect staff or inmates or to maintain the security of the institution.

(7) Good time. An inmate in controlled segregation earns compensation if he or she earned compensation in the previous status. If 1983 Wis. Act 528 does not apply to the inmate, he or she earns extra good time if he or she earned extra good time in the previous status.

(8) Records. Inmates in controlled segregation shall be visually checked every half hour. A written record or log entry shall be made at each such interval noting the emotional condition of the inmate.

(9) Credit. An inmate in controlled segregation receives credit toward a term of program segregation and adjustment segregation during such period of confinement.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; am. (1), Register, April, 1985, No. 352, eff. 5-1-85; emerg. am. (6) (b), eff. 11-18-85; am. (6) (b), Register, May, 1986, No. 365, eff. 6-1-86; am. (7), Register, February, 1987, No. 374, eff. 3-1-87; am. (4), Register, April, 1994, No. 460, eff. 5-1-94.

303.72 Minor penalties.

Minor penalties in accordance with ss. DOC 303.68 and 303.84 shall include:

(1) Reprimand. A reprimand is any oral statement by the committee or hearing officer to an inmate when the inmate is found guilty of a disciplinary offense. The reprimand should only be recorded if no other penalty is given.

(2) Loss of recreation privileges. Recreation privileges include sports or exercise periods, movies, and leisure activities outside the cell, either on grounds or off grounds.

(3) Room and cell confinement. Room and cell confinement may be imposed at any time for a maximum of 10 days. During the hours of confinement, the inmate may not leave his or her quarters without specific permission. Permission may be granted for attendance at religious services, medical appointments, showers, and visits from outside persons, if these must occur during the hours of confinement. Any or all electronic equipment may be removed from an inmate's quarters if room confinement is imposed.

(4) Loss of a specific privilege. Specific privileges which may be lost if abused include but are not limited to: use of inmate's own TV, radio or cassette player; phone calls; participation in off grounds activities; having meals in the dining room; and canteen privileges. These privileges may be taken away for up to 30 days for the first offense, for up to 60 days for the second, and permanently for the third. However, visiting and mail may be suspended for periods of time in accordance with ss. DOC 309.05 and 309.17. No-contact visiting may be imposed in accordance with ss. DOC 309.16 and 309.165.

(5) Restitution. Restitution is payment to the owner for the replacement or repair of stolen, destroyed and damaged property or for medical bills. Property for which restitution is ordered shall be valued at the cost of replacing or repairing such property, whichever is less. An inmate may be ordered to make full or partial restitution. Money may be withheld from earnings or taken from an inmate's account to satisfy the requirements to make restitution.

(6) Extra duty. An inmate may be assigned extra work or school duty for a specific number of hours without pay or be required to report as ordered to a school or a work assignment for as long as 10 days.

(7) Building confinement. This is confinement to the building in which the inmate resides.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; am. (3) and (4), Register, April, 1985, No. 352, eff. 5-1-85; am. (4), Register, April, 1994, No. 460, eff. 5-1-94.

303.73 Referral for prosecution.

(1) The superintendent of each institution shall, in conjunction with the local district attorney, develop a policy stating which offenses should be referred for prosecution. The policy should cover the following points:

(a) Which statutory crimes should be considered for prosecution;

(b) The amount of evidence needed before prosecution should be considered;

(c) The circumstances in which, even though a violation of the criminal statute can be proved, there should not be prosecution (for instance, less serious battery); and

(d) Which disciplinary offenses may include a crime which is referred for prosecution.

(2) When one of the offenses mentioned in sub. (1) (d) above is alleged in a conduct report, the security director shall review the

conduct report in light of the policy to determine if the case should be referred to the district attorney.

(a) If necessary, the security director shall order an investigation to determine if sufficient evidence exists for referral to the district attorney.

(b) If the security director refers the offense to the district attorney, the district attorney shall decide whether to bring charges against an inmate.

(3) Whether or not the review described in sub. (2) results in prosecution being started, the incident may be handled as a disciplinary offense.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80.

303.74 Summary disposition procedure.

(1) An inmate may be summarily found guilty and punished for minor rule infractions in accordance with this section.

(2) Before an inmate is summarily found guilty and punished, a staff member:

(a) Shall inform the inmate of the nature of the alleged infraction and the contemplated penalty; and

(b) Shall inform the inmate that the incident may be handled summarily or that it may be handled through the formal disciplinary process.

(3) If the inmate agrees to summary disposition, the staff member shall inform the inmate of the punishment.

(4) Before imposing the punishment, the staff member shall get the oral or written approval of the shift supervisor. If the shift supervisor disapproves of the summary disposition, the alleged infraction shall either be handled through the formal disciplinary process or the disposition shall be altered so that it is approved by the shift supervisor.

(5) Punishments imposed pursuant to this section shall not exceed the following:

(a) Reprimand;

(b) Loss of a specific privilege for 1 to 15 days, except visits, including no-contact visiting, and mail;

(c) Two nights in room confinement;

(d) Loss of recreation privilege for 1 to 15 days;

(e) Extra duty beyond the normal work day; or

(f) Building confinement.

(6) A record of dispositions made pursuant to this section shall be written on an appropriate form indicating that summary disposition has been made and approved by the shift supervisor.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; am. (5) (b), Register, April, 1994, No. 460, eff. 5-1-94.

303.75 Hearing procedure for minor violations.

(1) Notice. When an inmate is alleged to have committed a minor violation and the security director or designee has reviewed the conduct report pursuant to s. DOC 303.67 and the conduct report has not been disposed of summarily in accordance with s. DOC 303.74, a copy of the approved conduct report shall be given to the accused inmate. The conduct report shall include the offense or offenses charged, the facts upon which the charges are based, the sources of information and the date of the hearing, and shall notify the inmate of the time of the hearing and that the hearing may be conducted without the inmate being present if the inmate refuses to appear at the hearing.

(2) Time limits. Except as provided in this subsection, the hearing may not be held until at least 2 working days after the inmate receives the approved conduct report, or later than 21 days after the inmate receives the approved conduct report. The inmate may request more time to prepare, and this request shall be granted by the hearing officer unless there is a good reason to deny the request. An inmate may waive in writing the time limits provided in this section.

(3) Hearing officer. The superintendent shall appoint one or more staff members to serve as hearing officers. Only persons who are eligible to serve on the adjustment committee may be appointed. A hearing officer with substantial involvement in the conduct report may not hold a hearing on that conduct report.

(4) Hearing. At the hearing, a hearing officer shall review the conduct report and discuss it with the inmate. The inmate shall be provided with an opportunity to respond to the report and make a statement about the alleged violation. The hearing officer may question the inmate. The inmate has no right to a staff advocate, to confront witnesses or to have witnesses testify on his or her behalf. If an inmate refuses to attend a hearing, the hearing may be conducted without the inmate being present.

(5) Decision and disposition.
(a) The hearing officer shall decide the guilt or innocence of the inmate on each charge, decide the punishment, and announce these decisions to the inmate. Penalties for minor violations shall be imposed in accordance with s. DOC 303.72. Penalties for major violations when a due process hearing is waived under s. DOC 303.76 (6) shall be imposed in accordance with ss. DOC 303.83 and303.84 .

(b) The institution shall establish guilt based on the preponderance of the evidence.

(c) The hearing officer shall state in writing the finding of guilt for each charge, the punishment and the reasons for it on the conduct report and return it to the security office for record entry and compliance with the disposition.

(6) Appeal. An inmate may appeal the disposition of a minor hearing within 10 days to the superintendent.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; r. and recr. Register, April, 1985, No. 352, eff. 5-1-85.

303.76 Hearing procedure for major violations.

(1) Notice. When an inmate is alleged to have committed a major violation and the security director or designee has reviewed the conduct report pursuant to s. DOC 303.67, a copy of the approved conduct report shall be given to the inmate within 2 working days after its approval. The conduct report shall inform the inmate of the rules which he or she is alleged to have violated, the potential penalties or other potential results that may be imposed, including but not limited to removal from work

release, and that he or she may exercise the right to a due process hearing or may waive this right in writing. The inmate shall be informed that if he or she waives the right to a formal due process hearing, he or she will be given an informal hearing under s. DOC 303.75. The inmate shall be informed that if a formal due process hearing is chosen, the inmate may present oral, written, documentary and physical evidence, and evidence from voluntary eyewitnesses in accordance with this section and s. DOC 303.81; that he or she has a right to the assistance of a staff advocate in accordance with this section and s. DOC 303.79; that the adjustment committee may permit direct questions or require the inmate or his or her advocate to submit questions to the adjustment committee to be asked of the witness; that repetitive, disrespectful and irrelevant questions are forbidden; and that the inmate may appeal the finding and disposition of the adjustment committee in accordance with sub. (7). The inmate shall also be informed that if he or she refuses to attend a hearing, the hearing may be conducted without the inmate being present.

(2) Waiver. An inmate may waive the right to a due process hearing in writing at any time. If the inmate waives a due process hearing, the conduct report shall be disposed of under the hearing procedures for minor violations, s. DOC 303.75. A waiver does not constitute an admission of the alleged violation. A waiver may not be retracted without the security director's approval.

(3) Time limits. A due process hearing shall be held no sooner than 2 working days or later than 21 days after the inmate receives a copy of the conduct report and hearing notice. An inmate may waive these time requirements in writing if the security director agrees to the waiver. The inmate may request additional time to prepare for the hearing, and the security director shall grant the request unless there is a good reason to deny it.

(4) Place. The due process hearing may take place at the institution where the alleged conduct occurred, at a county jail or at an institution to which an inmate has been transferred.

(5) Hearing. The adjustment committee, as defined in s. DOC 303.82, shall conduct the due process hearing. If an inmate refuses to attend the hearing or disrupts the hearing, the hearing may be conducted without the inmate being present. At a due process hearing, the conduct report shall be read aloud and all witnesses for or against the accused, including the accused himself or herself and the staff member who wrote the conduct report, shall have a chance to speak. The adjustment committee may require that physical evidence be offered. The adjustment committee may permit direct questions or require the inmate or his or her advocate to submit questions to the adjustment committee to be asked of the witness. Repetitive, disrespectful or irrelevant questions are forbidden.

(6) Decision. After the hearing the adjustment committee shall deliberate in private, considering only the evidence presented to it and the inmate's records. The institution is required to establish guilt by a preponderance of the evidence. The adjustment committee may find the inmate guilty or not guilty. A committee of 3 may find the inmate guilty if at least 2 of the 3 members find by a preponderance of the evidence that he or she is guilty, and if 2 agree upon a sentence, may sentence the inmate. A committee of 2 or of one may find the inmate guilty if the committee members unanimously find by a preponderance of the evidence that the inmate is guilty and may sentence the inmate if they are unanimous as to the sentence. If a sentence is not agreed upon, the matter shall be referred to the superintendent for decision. The committee shall then recall the accused and his or her advocate, if any, and announce its decision or the decision of the

superintendent. The accused and his or her advocate, if any, shall each receive a written copy of the decision.

(7) Appeal.
(a) Any time within 10 days after a due process hearing, an inmate who is found guilty may appeal the decision or the sentence, or both, to the superintendent.

(b) The superintendent shall review all records and forms pertaining to the appeal and make his or her decision within 10 days following receipt of the request.

(c) The superintendent's decision shall be to:

1. Affirm the adjustment committee's decision and the sentence;

2. Affirm the adjustment committee's decision but reduce the sentence in type or quality;

3. Reverse the adjustment committee's decision. In this case, all records of the decision shall be removed from all offender-based files. Records may be kept for statistical purposes only; or

4. Return the case to the adjustment committee for further consideration.

(d) The superintendent's decision is final.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; r. and recr. Register, April, 1985, No. 352, eff. 5-1-85.

303.78 Due process hearing: advocates.

(1) (a) At each institution, the superintendent may designate or hire staff members to serve as advocates for inmates in disciplinary hearings at the institution, or staff members may volunteer to serve as advocates.

(b) At institutions that do not employ permanent fulltime advocates, the superintendent shall place the names of 3 staff members who are available to serve as advocates in a particular week on a list and shall give the list to the hearing officers. The inmate shall be permitted to choose an advocate from the list of 3, except that the caseloads of advocates may be regulated by the superintendent.

(c) At institutions that employ permanent full-time advocates, the superintendent shall assign advocates to inmates. If an inmate objects to the assignment of a particular advocate because the advocate has a known and demonstrated conflict of interest in the case, the superintendent shall assign a different staff member to serve as the inmate's advocate.

(2) The advocate's purpose is to help the accused to understand the charges against him or her and to help in the preparation and presentation of any defense he or she has, including gathering evidence and testimony, and preparing the accused's own statement. The advocate may speak on behalf of the accused at a disciplinary hearing or may help the accused prepare to speak for himself or herself.

(3) A training program for advocates should be conducted as often as possible. The training program should cover the following subjects:

(a) Proper role of the advocate;

(b) Techniques of interviewing the accused;

(c) Conduct covered and not covered in each disciplinary rule including the significance of lesser included offenses;

(d) Techniques of factual investigation;

(e) The elements of violations in the rules; and

(f) Defenses.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; r. and recr. (1), Register, October, 1984, No. 346, eff. 11-1-84; renum. from HSS 303.79, Register, April, 1985, No. 352, eff. 5-1-85.

303.81 Due process hearing: witnesses.

(1) A request by the inmate for witnesses to appear at the major violation hearing, including requests for the appearance of the staff member who signed the conduct report, may be made by the accused to the advocate who shall deliver the request to the security office. Except for good cause, an inmate may present no more than 2 witnesses in addition to the reporting staff member or members. If an inmate does not have an advocate, the request shall be sent directly to the security office. This request shall be made within 2 days of the service of notice.

(2) After all witness requests have been received, the hearing officer shall review them and do any investigation necessary to determine whether the witnesses should be called. The hearing officer may only call witnesses who possess relevant information. If a witness refuses to appear, the hearing officer shall determine if the refusal is justified. If the refusal is justified, the hearing officer shall note on the record the reason for the witness' refusal to appear.

(3) Witnesses requested by the accused who are staff or inmates shall attend the disciplinary hearing unless:

(a) There is a significant risk of bodily harm to the witness if he or she testifies; or

(b) The witness is an inmate who does not want to testify; or

(c) The testimony is irrelevant to the question of guilt or innocence; or

(d) The testimony is merely cumulative of other evidence and would unduly prolong the hearing; or

(e) An inmate witness must be transported to a county jail to testify, in which case the advocate may be required to interview the witness and report on the testimony to the committee in lieu of a personal appearance by the witness.

(4) If an inmate witness will be unavailable due to hospitalization, transfer or release, or if a staff member witness, who may be the officer who reported the rule violation, will be unavailable due to illness, no longer being employed at the location, being on vacation or being on a different shift, but there is no other reason to exclude the witness's testimony under sub. (3), then the hearing officer shall attempt to get a signed statement from the witness to be used at the disciplinary hearing.

(5) If a witness's testimony would be relevant and useful to the adjustment committee but the witness does not wish to testify, or if testifying would pose a significant risk of bodily harm to the witness, the hearing officer may attempt to get a signed statement to be used at the disciplinary hearing. See s. DOC 303.86, Evidence, for the circumstances under which the adjustment

committee can consider such a statement without revealing the name of the witness.

(6) If it is not possible to get a signed statement in accordance with subs. (4) and (5), the hearing officer may consider other evidence of what the witness would say if present.

(7) After determining which witnesses will be called for the accused, the hearing officer shall notify the inmate of the decision in writing and schedule a time for a hearing when all of the following people can be present:

(a) Adjustment committee members;

(b) Advocate, if any;

(c) Officer who wrote the conduct report;

(d) Other witnesses against the accused (if any);

(e) Accused; and

(f) Witnesses for accused (if any).

(7m) In the case of inmate witnesses and the accused, an attempt should be made to avoid conflict with off ground activities, but these persons may be required to attend the hearing even if it conflicts with other activities.

(8) Witnesses other than inmates or staff may not attend hearings but they may be contacted by advocates with the hearing officer's permission. The adjustment committee may designate a staff member to interview any such witness and report to the committee.

(9) The hearing officer shall prepare notice of the hearing and give it to the accused, the advocate (if any), the committee and all witnesses, including the staff member who wrote the conduct report.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; am. (1) to (4) and (8), Register, April, 1985, No. 352, eff. 5-1-85.

303.82 Adjustment committee.

(1) Due process disciplinary hearings shall be conducted by a committee of one, 2 or 3 staff members appointed by the superintendent. Persons eligible to serve on an adjustment committee are: the superintendent, assistant superintendents, supervisors, correctional officers, social workers, and any other equally responsible staff members. Efforts shall be made to place staff from diverse backgrounds on the multi-member adjustment committee. At least one member of every adjustment committee shall be a supervisor.

(2) No person who has personally observed or been a part of an incident which is the subject of a hearing may serve on the committee for that hearing. Committee members should find out the subject matter of the hearing in advance in order to allow replacement of committee members if necessary and thereby avoid the necessity of postponing the hearing. The security director who reviews the conduct report or classifies the offense, as required by ss. DOC 303.67 and303.68 , is not involved in the incident by reviewing the conduct report or classifying the offense to the extent that he or she is automatically disqualified from being on the adjustment committee.

(3) An adjustment committee may hold a hearing even if the inmate has waived due process, if it is more convenient for the

committee to hold the hearing than to schedule a hearing before a hearing officer. In that case the committee should follow the procedure for a hearing before a hearing officer.

(4) When a single hearing officer is sitting on the adjustment committee pursuant to sub. (1), or after the waiver of due process, he or she has the same authority as given the adjustment committee under this chapter.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; am. (1) and (2), Register, April, 1985, No. 352, eff. 5-1-85.

303.83 Sentencing considerations.

In deciding the sentence for a violation or group of violations, the supervisor making summary disposition or the adjustment committee or hearing officer who is holding the hearing shall consider the following:

(1) The inmate's overall disciplinary record, especially during the last year;

(2) Whether the inmate has previously been found guilty of the same or a similar offense, how often, and how recently;

(3) Whether the alleged violation created a risk of serious disruption at the institution or in the community;

(4) Whether the alleged violation created a risk of serious injury to another person;

(5) The value of the property involved, if the alleged violation was actual or attempted damage to property, misuse of property,

possession of money, gambling, unauthorized transfer of property, soliciting staff or theft;

(6) Whether the inmate was actually aware that he or she was committing a crime or offense at the time of the offense;

(7) The motivation for the offense;

(8) The inmate's attitude toward the offense and toward the victim, if any;

(9) Mitigating factors, such as coercion, family difficulties which may have created anxiety and the like;

(10) Whether the offense created a risk to the security of the institution, inmates, staff or the community; and

(11) The time he or she spent in TLU.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80.

303.84 Sentencing procedure and schedule of penalties.

(1) In every case where an inmate is found guilty of one or more violations of the disciplinary rules, one or more of the following penalties shall be imposed, except as provided in sub. (2) and ss. DOC 303.68 to 303.72:

(a) Reprimand;

(b) Loss of recreational privilege for 1 to 30 days;

(c) Room confinement for 1 to 10 days;

(d) Building confinement for 1 to 30 days;

(e) Loss of a specific privilege for 1 to 30 days for the first offense, for 1 to 60 days for the second offense and permanently for the third.

(f) Mail and visiting privileges and no-contact visiting as provided in the departmental rules relating to mail, visiting and no-contact visiting.

(g) Adjustment segregation for 1 to 8 days;

(h) Extra duty without pay for 1 to 10 days;

(i) Program segregation for a specific term of 30, 60, 90, 120, 180 or 360 days;

(j) Loss of good time for an inmate whose crime was committed before June 1, 1984, and who did not choose to have 1983 Wis. Act 528 apply to him or her, or extension of the mandatory release date for an inmate whose crime was committed on or after June 1, 1984, and for other inmates who chose to have 1983 Wis. Act 528 apply to them; or

(k) Restitution.

(2) Punishment imposed pursuant to sub. (1) is subject to the following:

(a) Adjustment segregation, program segregation and loss of good time or extension of the mandatory release date, whichever is applicable, may be imposed for a single major offense. At one hearing, the maximum penalty is the most severe penalty the inmate could receive for any single offense of which he or she is

found guilty. The duration of a penalty may not exceed the duration shown in Table 303.84.

TABLE DOC 303.84
SCHEDULE OF PENALTIES
(Maximum in days)

	Adjustment Segregation	Program Segregation
Offenses against bodily security		
303.12 Battery	8	360
303.13 Sexual assault -- intercourse	8	360
303.14 Sexual assault -- contact	8	360
303.15 Sexual conduct	4	120
303.16 Threats	5	180
303.17 Fighting	8	180
Offenses against institutional security		
303.18 Inciting a riot	8	360
303.19 Participating in a riot	6	360
303.20 Group resistance and petitions	4	180
303.21 Conspiracy	Maximum for completed offense	
303.22 Escape	8	360
303.23 Disguising identity	8	180
Offenses against order		
303.24 Disobeying orders	6	180
303.25 Disrespect	8	180
303.26 Soliciting staff	8	360
303.27 Lying	5	60
303.271 Lying about staff	8	360
303.28 Disruptive conduct	5	360
303.29 Talking	4	60
303.30 Unauthorized forms of communication	5	60

303.31 False names and titles	4	60
303.32 Enterprises and fraud	6	120
303.33 Attire	4	60
Offenses against property		
303.34 Theft	8	360
303.35 Damage or alteration of property	8	180
303.36 Misuse of state property	4	60
303.37 Arson	8	360
303.38 Causing an explosion or fire	6	180
303.39 Creating a hazard	6	120
303.40 Unauthorized transfer of property	5	120
303.41 Counterfeiting and forgery	8	360
Contraband offenses		
303.42 Possession of money	8	360
303.43 Possession of intoxicants	8	360
303.44 Possession of drug paraphernalia	8	360
303.45 Possession, manufacture and alteration of weapons	8	360
303.46 Possession of excess smoking materials	4	60
303.47 Possession of contraband – miscellaneous	6	120
303.48 Unauthorized use of the mail	8	360
Movement offenses		
303.49 Punctuality and attendance	5	120
303.50 Loitering	4	120
303.51 Leaving assigned area	5	120
303.511 Being in unassigned area	5	120
303.52 Entry of another inmate's quarters	8	360
Offenses against safety and health		
303.54 Improper storage	4	60

303.55	Dirty quarters	4	60
303.56	Poor grooming	4	60
303.57	Misuse of prescription medication	8	360
303.58	Disfigurement	5	120
Miscellaneous			
303.59	Use of intoxicants	8	360
303.60	Gambling	4	60
303.61	Refusal to work or attend school	4	60
303.62	Inadequate work or study performance	4	60
303.63	Violation of institutional policies and procedures	6	180
303.631	Violating conditions of leave	8	360
303.06	Attempt	Maximum for completed offense	
303.07	Aiding and abetting	Maximum for completed offense	

		Good Time Loss	Extension of Mandatory Release Date Under 1983 Wisconsin Act 528 *
Offenses against bodily security			
303.12	Battery	20	40
303.13	Sexual assault -- intercourse	20	40
303.14	Sexual assault -- contact	20	40
303.15	Sexual conduct	10	20
303.16	Threats	10	20
303.17	Fighting	20	40
Offenses against institutional security			
303.18	Inciting a riot	20	40
303.19	Participating in a riot	10	20

303.20	Group resistance and petitions	10	20
303.21	Conspiracy	Maximum for completed offense	
303.22	Escape	20	40
303.23	Disguising identity	20	40
	Offenses against order		
303.24	Disobeying orders	10	20
303.25	Disrespect	10	20
303.26	Soliciting staff	20	40
303.27	Lying	10	20
303.271	Lying about staff	20	40
303.28	Disruptive conduct	10	20
303.29	Talking	0	0
303.30	Unauthorized forms of communication	10	20
303.31	False names and titles	0	0
303.32	Enterprises and fraud	5	10
303.33	Attire	0	0
	Offenses against property		
303.34	Theft	20	40
303.35	Damage or alteration of property	15	30
303.36	Misuse of state property	0	0
303.37	Arson	20	40
303.38	Causing an explosion or fire	15	30
303.39	Creating a hazard	10	20
303.40	Unauthorized transfer of property	0	0
303.41	Counterfeiting and forgery	20	40
	Contraband offenses		
303.42	Possession of money	20	40
303.43	Possession of intoxicants	20	40
303.44	Possession of drug paraphernalia	20	40
303.45	Possession, manufacture and alteration of weapons	20	40

303.46	Possession of excess smoking materials	0	0
303.47	Possession of contraband -- miscellaneous	10	20
303.48	Unauthorized use of the mail	20	40
	Movement offenses		
303.49	Punctuality and attendance	5	10
303.50	Loitering	5	10
303.51	Leaving assigned area	10	20
303.511	Being in unassigned area	10	20
303.52	Entry of another inmate's quarters	20	40
	Offenses against safety and health		
303.54	Improper storage	5	10
303.55	Dirty quarters	0	0
303.56	Poor grooming	0	0
303.57	Misuse of prescription medication	20	40
303.58	Disfigurement	10	20
	Miscellaneous		
303.59	Use of intoxicants	20	40
303.60	Gambling	5	10
303.61	Refusal to work or attend school	5	10
303.62	Inadequate work or study performance	5	10
303.63	Violation of institutional policies and procedures	10	20
303.631	Violating conditions of leave	20	40
303.06	Attempt	Maximum for completed offense	
303.07	Aiding and abetting	Maximum for completed offense	

* Does not include the mandatory extension of 50% of the number of days spent in segregation status required under par.(e).

(am) More than one minor penalty may be imposed for a single offense and both a major and minor penalty may be imposed for a major offense.

(b) Loss of accumulated good time or extension of the mandatory release date may be imposed as a penalty only where the violation is listed as a major offense under s. DOC 303.68 (3) or is designated as a major offense by the security director because of its nature or the inmate's prior record.

(c) 1. For those inmates to whom 1983 Wis. Act 528 does not apply, the number of days of good time lost on one occasion may be based on the number of prior occasions on which the inmate lost good time but shall not exceed the following:

Number of prior occasions good time lost	Maximum number of days good time lost
None	5
One	10
2 or more	20

2. For those inmates to whom 1983 Wis. Act 528 applies, the number of days the mandatory release date is extended on one occasion may be based on the number of prior occasions on which the inmate lost good time or had his or her mandatory release date extended but shall not exceed the following:

Number of prior occasions good time lost or mandatory release date extended	Maximum number of days mandatory release date extended

None	10
One	20
2 or more	40

(d) Restitution may be imposed in addition to any other penalty.

(e) For those inmates to whom 1983 Wis. Act 528 applies, in addition to other penalties imposed in accordance with this subsection, the inmate's mandatory release date shall be extended by the number of days equal to 50% of the number of days spent in adjustment, program or controlled segregation status.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; am. (1) (intro.) and (h), (2) (a) table, (am) and (b), Register, April, 1985, No. 352, eff. 5-1-85; emerg. r. and recr. (1) (i) and (2), eff. 9-10-86; r. and recr. (1) (i) and (2), Register, February, 1987, No. 374, eff. 3-1-87; renum. (1) (f), (g), (h), (i) and (j) to (1) (g), (h), (i), (j) and (k) and am. (1) (e) and cr. (1) (f), Register, April, 1994, No. 460, eff. 5-1-94.

303.85 Recordkeeping.

(1) Records of disciplinary infractions may be included in an inmate's case record only in the following situations:

(a) If the inmate was found guilty by summary disposition procedure; or

Note:
See DOC 303.74.
(b) If the inmate was found guilty by a hearing officer or an adjustment committee. Records must be removed if an appeal is successful.

Note:
See DOC 303.79.
(2) Records of alleged disciplinary infractions which have been dismissed or in which the inmate was found not guilty may be kept for statistical purposes, but they may not be considered in making program assignment, transfer, or parole release decisions, nor may they be included in any inmate's case record.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; emerg. am. (1) (a), eff. 10-21-80; am. (1) (a), Register, March, 1981, No. 303, eff. 4-1-81; am. (1) (b), Register, April, 1985, No. 352, eff. 5-1-85.

303.86 Evidence.

(1) (a) "Evidence" is any statement or object which could be presented at a disciplinary hearing or in a court of law, whether or not it is admissible.

(b) Evidence is relevant if that evidence makes it appear more likely or less likely that the inmate committed the offense of which he or she is accused.

Note:
For example: an inmate is accused of threatening another inmate. Testimony that the accused and the other inmate had a loud argument the day before is relevant. It indicates a possible motive for a threat and makes it appear more likely that a threat occurred. An officer testifies that the accused has lied to him or her on previous occasions. This is relevant if the testimony of the accused varies from the conduct report.

(2) (a) An adjustment committee or a hearing officer may consider any relevant evidence, whether or not it would be

admissible in a court of law and whether or not any violation of this chapter occurred in the process of gathering the evidence.

(b) An adjustment committee or a hearing officer may refuse to hear or admit relevant evidence for any of the following reasons:

1. The evidence is not reliable, for example: opinions which are not supported by factual observation; hearsay (statements made outside of the hearing); reputation of the witness;

2. The evidence, even if true, would be of marginal relevance, for example: evidence of prior acts by the accused or a witness, to show that he or she is repeating a pattern; or

3. The evidence is merely cumulative of evidence already received at the hearing and is no more reliable than the already admitted evidence, for example: testimony of other inmates corroborating the accused's story, when corroboration has already occurred.

(3) If a witness is unavailable to testify, a written statement, a transcript of an oral statement, or a tape-recorded statement may be considered. Unavailability means death, transfer, release, hospitalization, or escape in the case of an inmate; death, illness, vacation, no longer being employed at that location, or being on a different shift in the case of a staff member.

(4) If a witness refuses to testify in person and if the committee finds that testifying would pose a significant risk of bodily harm to the witness, the committee may consider a corroborated, signed statement under oath from that witness without revealing the witness's identity. The contents of the statement shall be revealed to the accused, though the statement may be edited to avoid revealing the identity of the witness. The committee may question the witnesses, if they are otherwise available. Two

anonymous statements by different persons may be used to corroborate each other. A statement can be corroborated in either of the following ways:

(a) By other evidence which substantially corroborates the facts alleged in the statement such as, eyewitness account by a staff member or circumstantial evidence; or

(b) By evidence of a very similar violation by the same person.

(5) After disposition has been reached by the adjustment committee, and if a finding of guilt results, restricted informant material shall then be forwarded to the security office for retention in the restricted security department file with all other copies of the entire hearing results.

(6) The original conduct report and all due process documents shall be placed in the inmate's case record. However, restricted informant reports shall be placed only in the security department restricted file.

History
Cr. Register, August, 1980, No. 296, eff. 9-1-80; am. (6), Register, April, 1985, No. 352, eff. 5-1-85.

303.87 Harmless error.

If a procedural requirement under this chapter is not adhered to by staff, the error may be deemed harmless and disregarded if it does not substantially affect the rights of the inmate. Rights are substantially affected when a variance from a requirement prejudices a fair proceeding involving an inmate.

History
Cr. Register, April, 1985, No. 352, eff. 5-1-85.

FILED

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CASE NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LYDIA SANTIAGO, as personal representative of the Estate of Jaime Santiago,
Petitioner,

v.

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL, and DENNIS DANNER,
Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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April 15, 1997

6 pp

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On Petition For Writ Of Certiorari
To The Court Of Appeals
Of The State Of Wisconsin

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioner has asked the Court to review three questions: (1) whether an inmate has a liberty interest in continued participation in a community residential confinement program; (2) whether the "random and unauthorized" doctrine under 42 U.S.C. § 1983 applies when a hearing officer finds an

inmate guilty of misconduct without any evidence of guilt; and (3) whether certain claims under 42 U.S.C. § 1983 are waived by failing to raise the claims in an administrative appeal. Since February 18, 1997, when the petition for writ of certiorari in this case was initially submitted, there has been no intervening matter to justify a supplemental brief under Supreme Court Rule 15.8 on the second and third questions. The Court's March 18, 1997 decision in *Young v. Harper*, Case No. 95-1598, however, directly affects the petitioner's argument in the certiorari petition in support of review of the first question. Accordingly, she submits this supplemental brief to inform the Court of the significance of *Young v. Harper* on the certiorari petition.

ARGUMENT

UNDER *YOUNG V. HARPER*, SANTIAGO HAD A PROTECTED LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE ITSELF.

The focus of the argument in the certiorari petition on whether Jaime Santiago had a liberty interest in continued participation in Wisconsin's Conditional Residential Confinement ("CRC") program was on the role of states in creating protected liberty interests. In *Sandin v. Conner*, __ U.S. __, 115 S.Ct. 2293(1995), the Court held that courts need not "search for a negative implication from mandatory language" in state laws and regulations to determine whether a state-created liberty interest exists. The petitioner in this case asked the Court to decide the important question of whether that *Sandin* holding, in effect, eliminates the ability of states to create liberty interests by, for example, using explicit, positive language mandating due process. In her first point heading, however, the petitioner

pointed out that a decision in *Young v. Harper* might establish that Santiago had a protected liberty interest under the due process clause itself. If so, the Court need not reach the issue raised by the Court's holding in *Sandin v. Conner*.

The issue in *Young v. Harper* was whether an Oklahoma preparole conditional release program was like parole as the Court defined parole in *Morrissey v. Brewer*, 408 U.S. 471 (1972). *Young v. Harper*, 1997 U.S. LEXIS 1919, at *8. In concluding that the Oklahoma preparole program was equivalent to parole and that removal from it required due process protection, the Court relied extensively on *Morrissey*:

> 'The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.' *Morrissey*, 408 U.S. at 477. In, *Morrissey*, we described the 'nature of the interest of the parolee in his continued liberty':
>
> > He can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.... The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. *Id.*, at 482.

> This passage could just as easily have applied to respondent [Harper] while he was on preparole.

1997 U.S. LEXIS 1919, at * 9. With one major exception, it also could have applied to Santiago. Instead of relying on an implicit promise that his community program would be revoked only if he failed to live up to the program conditions, Santiago could rely on the explicit state rule that removal from the program for disciplinary reasons required a due process hearing.

In addressing the issue of whether Santiago's participation in the CRC program reflected a protected liberty interest, the Wisconsin Court of Appeals did not have the benefit of the Court's decision in *Young v. Harper*. It relied on *Sandin v. Conner* rather than *Morrissey v. Brewer*, and its reasons for reaching a different conclusion than the 10th Circuit reached in *Harper v. Young*, 64 F.3d 563 (10th Cir. 1995), are similar to the arguments that the Court rejected in its March 18, 1997 *Young v. Harper* decision. Petition for Writ of Certiorari to the Court of Appeals of the State of Wisconsin and Appendix, pp. 14a-22a. Based on *Young v. Harper* and *Morrissey v. Brewer*, this Court should summarily reverse the decision of the Wisconsin Court of Appeals that the CRC program did not create a liberty interest or, in the alternative, it should grant the petition for certiorari to determine the significance of the state's explicit mandate that removal from the program for disciplinary purposes be based on a due process hearing.

CONCLUSION

For the above reasons, and for the reasons stated in the certiorari petition, the petitioner respectfully requests that the Court grant the petition for certiorari, summarily dispose of the petition on its merits, or remand the case to the Wisconsin Court of Appeals for reconsideration in light of *Young v. Harper* and *Felder v. Casey*.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

LYDIA SANTIAGO, as personal representative of the Estate of Jaime Santiago,

Petitioner,

v.

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL, and DENNIS DANNER,

Respondents.

On Petition for Writ of Certiorari
to the Court of Appeals
of the State of Wisconsin

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING WRIT

This case involves procedural due process allegations to which settled law applies. No novel theory of law is

presented. This is at most a fact-bound case.

Petitioner sets forth a cascading set of three issues, each dependent on his success on the preceding issue. Unfortunately for clarity, petitioner presents the issues in reverse order. In correct order, to succeed on his CRC liberty interest theory, petitioner must first succeed on his Random and Unauthorized issue. However, to get to that issue, he must first overcome his waiver of due process issues by failing to raise them in the first place.

Petitioner's "FACTS"[1] cloud the time line and the respondents' actions. One

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[1]A significant omission is that Santiago received a rehearing of the charges and was found not guilty of the policies and procedures charge, but guilty on the disruptive conduct charge. This is a critical omission regarding petitioner's random and unauthorized argument.

could conclude from petitioner's facts that respondents pulled Santiago out of his CRC placement at the Plymouth Nursing Home (Plymouth), transferred him to the Waupun Correctional Institution (WCI), and then terminated his CRC status. In reality, the respondents were neither involved in his transfer from Plymouth to WCI nor in the termination of his CRC status. With these facts clarified, this case becomes minerun procedural due process and not worthy of review.

The chronology is critical. On June 18, 1992, Santiago was involved in an altercation with a cook at Plymouth. This altercation was the culmination of a long series of misconduct by Santiago at Plymouth and caused the Plymouth administrator to inform DOC personnel on June 19, 1992, that she was terminating

Santiago's placement at Plymouth and he must be removed from the facility.

Santiago was removed from Plymouth on June 19, 1992, and transported to the University of Wisconsin Hospital for evaluation. On June 20, 1992, Santiago was transferred to WCI.

The conduct report covering the altercation was not even written until June 29, 1996, and then served on Santiago at WCI on July 1, 1992. The conduct report hearing took place at WCI on July 20, 1992. These respondents' actions with regard to hearing this conduct report had no relation to Santiago's removal from Plymouth and transfer to WCI. Santiago was already at WCI when the conduct report was issued and heard.

These respondents -- Ware, the security director who processed the

conduct report initially; Zangl, the hearing officer; and Danner, the administrative appeal cfficer -- likewise had no role in Santiago's termination from the CRC program. This decision was made by a Program Review Committee (PRC) after the disciplinary hearing was completed. None of the respondents was on the PRC.

Respondent Zangl had referred Santiago to the PRC at the end of the disciplinary hearing. Such referral is not however a disciplinary consequence. See, Wis. Admin. Code ch. DOC 303.84. PRC referral does not mandate any particular result. In fact, referral to a PRC is so routine that it can be done at anytime by any staff member or the inmate himself. DOC 302.18(3)(b). The PRC had total discretion to do whatever it wished regarding Santiago's status using the

criteria of DOC 302.14 and 302.16. See, DOC 302.19(6).

I. PETITIONER'S FAILURE TO RAISE DUE PROCESS ISSUES IN HIS ADMINISTRATIVE APPEAL WAIVED THESE ISSUES.

It is uncontroverted that petitioner failed to raise any due process issues in his administrative appeal to the warden after his disciplinary hearing. The court of appeals applied "without hesitation", the waiver doctrine to administrative appeals in the prison setting. While a state need not give its prisoners a right of administrative appeal from disciplinary decisions, Wisconsin affords prisoners more process than the 14th amendment requires. The procedure for major violation hearings includes the right of administrative appeal. In that sense, an

administrative appeal is an extension of the disciplinary hearing.

While petitioner claims that the court of appeals "created a broad new doctrine of waiver," such is not the case. To hold otherwise would undermine the administrative mechanisms of the Department of Corrections for resolving disputes within its penal institutions. There is no difference between an inmate waiving his appearance before a disciplinary hearing and then being precluded from attacking the adjudication as a violation of his constitutional rights[2] and an inmate filing an administrative appeal, which is part of

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[2]See Howard v. Wilkerson, 768 F. Supp. 1002, 1006 (S.D.N.Y. 1991). See also Ghana v. Fauver, No. 85-3545, 1989 Westlaw 61872 (Dist. N.J. June 9, 1989), affirmed 887 F.2d 261 (3rd Cir. 1989); Morgan v. Ward, 699 F. Supp. 1025, 1044 (N.D.N.Y. 1988).

the disciplinary process, and failing to raise issues he later claims were violative of his rights.

II. EVEN IF PETITIONER OVERCOMES HIS WAIVER, THE "RANDOM AND UNAUTHORIZED" DOCTRINE PRECLUDES § 1983 LIABILITY.

Petitioner attempts to breathe life into his claim by arguing that the Random and Unauthorized Doctrine does not apply to the finding of guilt as to the policies and procedures charge. Petitioner's intricate argument, however, neglects its most basic underpinning: it fails to mention that petitioner received a rehearing on the conduct report in question and was found not guilty of policies and procedures. As stated by Judge Sundby in his court of appeals concurrence, "[t]here is no cause of action for an aborted denial of procedural

due process as long as the mistake is corrected before there is a loss of liberty . . . here the deprivation did not occur until after Santiago had been given all the process he was due."

In the final analysis, as to the policies and procedures charge, the disciplinary process righted itself and there was no impact on petitioner of any kind as a result of the initial guilty finding.

In any event, the Random and Unauthorized Doctrine applies to the facts of this case. Wis. Admin. Code § DOC 303.76(6) established a duty on the hearing officer and administrative appeals officer to meet the preponderance of evidence standard before finding Santiago guilty. Their conduct violating that duty was random and unauthorized. The sanction

of a ten day extension of mandatory release date could have been reviewed by way of state court certiorari. This Santiago failed to do. Certiorari review would have provided an adequate remedy because the circuit court could have restored any lost good time and expunged his disciplinary record.

III. CRC AND LIBERTY INTEREST.

Even if the issue of whether an inmate in CRC status in Wisconsin has a liberty interest in remaining in that status is reached, this is not the case to address that issue. As set forth in the introduction to this response, these respondents had absolutely nothing to do with Santiago's removal from the nursing home and transfer to the Waupun Correctional Institution. Further, none

of these respondents was on the program review committee which terminated his CRC status. Here Santiago was merely referred to the program review committee at the end of the disciplinary hearing. Hardly an atypical or significant deprivation. In fact, no deprivation at all. The PRC, pursuant to Wisconsin Administrative Code, has total discretion to do whatever it wished regarding Santiago's status, using the various criteria of the Administrative Code. The referral to the PRC did not mandate any particular result.

Respondents' actions were simply too remote and too attenuated to create personal liability under 42 U.S.C. 1983. The petition would make this respondents surrogates for matters happening to Santiago before and after their involvement. 42 U.S.C. creates a cause of

action based on personal liability and predicated on fault. An individual cannot be held liable unless he caused or participated in an unconstitutional deprivation of rights. Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983).

CONCLUSION

This court should deny the petition for writ of certiorari.

Dated this 21 day of April, 1997.

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PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

INTRODUCTION

In *Young v. Harper*, Case No. 95-1598, the Court held that inmates have a liberty interest directly under the due process clause of the 14th Amendment in a pre-parole

conditional release program. The decision addressed virtually the identical questions presented in this case, making it appropriate for the Court to summarily reverse the Wisconsin Court of Appeals. The court of appeals mistakenly relied on *Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293 (1995) in holding that there was no liberty interest in continuation in the Wisconsin Community Residential Confinement (CRC) program. In the petition (prepared prior to the Court's decision), the petitioner argued that *Young* might control. Once *Young* was decided, the petitioner prepared a supplemental brief to specifically address the implications of *Young*.

In their response to the petition for certiorari, the respondents did not try to distinguish *Young* or argue that *Young* did not essentially invalidate the decision of the Wisconsin Court of Appeals on the liberty interest issue. Indeed, the respondents did not even cite or refer to *Young* anywhere in their response. Instead, they essentially requested denial of the petition on two grounds: first, they argued that the liberty interest issue in effect is mooted by threshold issues that were correctly decided by the Wisconsin Court of Appeals, and second that the resolution of the issues turn on factual disputes.

Contrary to the respondents' arguments, not only is the liberty interest issue independent of the other two issues raised in the petitioner's questions presented, but the implications of *Young* suggest that the random and unauthorized defense is inapplicable to this case. Moreover, the factual issues that the respondents attempt to make material, are issues on which the trial court made findings of fact in the petitioner's favor and that the Wisconsin Court of Appeals left undisturbed.

SUPPLEMENTAL BACKGROUND

The trial court found that the respondents Zangl and Danner violated several of Santiago's due process rights, including his right to a due process hearing, and his right to be convicted based on some evidence on both the charge of disruptive conduct and the charge of violating institution policies and procedures. The Wisconsin Court of Appeals first held that Santiago had a liberty interest in not having his mandatory release date extended, but not in his removal from the CRC program. Petition for Writ of Certiorari and Appendix, ("App."), pp. 13a-21a. The court then held that by failing to include claims in an administrative appeal, Santiago waived all of his due process claims, except for his claims that his convictions violated the "some evidence" rule of *Superintendent Massachusetts Correctional Institution v. Hill*, 472 U.S. 445 (1985). *Id.*, p. 21a and 21a n.15. The court agreed that the defendants' violated the some evidence rule on the policies and procedures charge but not on the disruptive conduct charge. *Id.*, p. 30a. Finally, the court held that the random and unauthorized doctrine insulated the defendants from liability for violating Santiago's right to be convicted on the basis of some evidence on the charge of violating institution policies and procedures. *Id.*, p. 36a. In doing so, the court concluded that Santiago had an adequate state remedy for the extension of his mandatory release date. *Id.*, p. 37a. Since it had already rejected Santiago's argument that his removal from the CRC program implicated a liberty interest, the court did not decide whether there was an adequate state remedy for that removal.

A judge who concurred in the majority opinion by the court of appeals believed that an institutional rehearing cured the due process deprivations and also eliminated any claims Santiago had based on the due process violations. *Id.*, pp. 43a-45a. At the conclusion of the July 20, 1992 disciplinary hearing, respondent Zangl recommended that Santiago be removed from the CRC program. The program review committee (PRC) subsequently formally removed him from the program. Having been removed from the program, Santiago remained at Waupun, rather than in a community setting. In September 1992, Santiago filed this lawsuit in circuit court in Dane County, Wisconsin. Some time later, respondent Danner ordered that an internal rehearing be held. At the February 1993 rehearing, Santiago was found not guilty of violating policies and procedures, but guilty of disruptive conduct. The circuit court believed that the guilty finding at the rehearing was constitutionally defective. *Id.*, p. 70a.

ARGUMENT

I. EACH QUESTION PRESENTED IS CONSEQUENTIAL REGARDLESS OF THE RESOLUTION BY THE COURT OF OTHER QUESTIONS OR WHETHER THE OTHER QUESTIONS ARE EVEN ADDRESSED.

The respondents do not address the merits of the questions the petitioner identified in the petition. In particular, the respondents completely ignore the fundamental issue of whether *Young v. Harper* mandates due process hearings before Wisconsin inmates may be removed from the CRC program. Instead, the respondents suggest that the resolution of that issue (by a decision of this Court, by a summary reversal, or by a

remand for reconsideration in light of *Young*) would be inconsequential to this case. Specifically, the respondents contend that "to succeed on his CRC liberty interest theory, petitioner must first succeed on his Random and Unauthorized issue [and] ... to get to that issue, he must first overcome his waiver of due process issues by failing to raise them in the first place. Response to Petition for Writ of Certiorari, p. 2.

The respondents are wrong. The Wisconsin Court of Appeals held that Santiago did not waive claims based on the "some evidence" standard. Regardless of this Court's actions on the waiver or exhaustion issue, the question of whether there is a liberty interest in the CRC program remains a viable issue on the "some evidence" due process claims. While the court of appeals concluded that the random and unauthorized test disposed of the "some evidence" claims, it did not reach the question of whether the test applies to the deprivation of the loss of CRC status. Accordingly, the court did not decide whether there was an adequate state remedy for the loss of CRC status – a necessary remedy before a claim can be barred by the random and unauthorized doctrine. Again, regardless of this Court's actions on the random and unauthorized question, the liberty interest issue will remain viable. Moreover, in light of *Young*, it is unlikely that there is an adequate state remedy to the substantial loss of CRC placement.

As the Wisconsin Supreme Court has noted, an inmate grievance system and state certiorari review provide inmates who have suffered limited deprivations adequate post-deprivation remedies. *Irby v. Macht*, 184 Wis. 2d 831, 850-51, 522 N.W.2d 9 (1994). It is unlikely that any court would conclude, based on the trial court's findings of fact, that Santiago suffered only "limited deprivations."

The respondents argue that the February 1993 rehearing eliminated Santiago's sec. 1983 claim completely. At most, however, the rehearing would have affected the amount of Santiago's damages, not the availability of sec. 1983 relief in the first place. Santiago's damages flowing from removal from the CRC program began well before February 1993 - either from the time of Zangl's recommendation for removal from the CRC program or from the PRC's formal action removing him from the program. Not only were there damages to the plaintiff from his removal from the program, he was also awarded damages for the violation of his due process rights at the July 20, 1992 hearing. App., pp. 26a and 71a. Finally, the trial court found that the rehearing was constitutionally deficient. *Id.*, p. 70a.

II. THE UNDISPUTED FACTS AS FOUND BY THE TRIAL COURT AND LEFT UNDISTURBED ON APPEAL ESTABLISH CLAIMS FOR RELIEF UNDER 42 U.S.C. § 1983.

The respondents argue in their response brief that their actions cannot as a matter of law create liability under sec. 1983 because they were not involved in the decision to remove Santiago from his nursing home placement, and they were not members of the program review committee that removed Santiago from the CRC placement. The respondents have no support for this argument in the decisions of either the trial court of the Wisconsin Court of Appeals. Santiago's claim has always been that the respondents violated his constitutional rights because their actions under color of state law caused his removal - not from a particular nursing home or a particular placement - but from the CRC program itself.

The respondents' attempt to create and then hide behind the shield of the PRC is also unavailing. The trial court found that the respondents' actions caused the plaintiff's removal from the CRC program:

> 22. As a direct result of the findings of guilt and the disposition referring plaintiff to the PRC, his security classification was changed from minimum to maximum, he was terminated from CRC., and held at WCI until June 30, 1993. Although, a PRC review would have occurred based on plaintiff's discharge from the nursing home, the PRC review that did occur was as a result of the hearing before defendant Zangl and the results were based upon the findings made by defendant Zangl and confirmed by defendant Danner.

App. 65a.

> 28. If Mr., Santiago had gone before the PRC because of discharge from Plymouth Manor but without two major rule violations on his record it is unlikely that his security classification would have changed. He would therefore have been eligible to continue on CRC and to be placed in another nursing home (which he was on June 30, 1993) or to reside in the home of one of a number of relatives, which his sister, Lydia Santiago, as well as Mr. Santiago, himself, testified he could, as a practical matter, have done.

App. 67a-68a (footnote omitted). The Wisconsin Court of Appeals did not disturb those findings.

III. ALL OF THE QUESTIONS PRESENTED ARE APPROPRIATE FOR COURT REVIEW, FOR SUMMARY REVERSAL, OR FOR REMAND IN LIGHT OF SUPREME COURT CASES.

In light of *Young*, there is little doubt that the Wisconsin Court of Appeals erred in its analysis of whether Santiago had a liberty interest in continued placement in the CRC program. It should not have resolved the issue based on *Sandin*, at least until it had determined whether Santiago had a liberty interest under the due process clause under the principles of *Wolff v. McDonnell*, 418 U.S. 539 (1974). The respondents did not dispute this in their response brief; instead, they completely ignored it. They argue, however, that the issue is moot because Santiago loses anyway on the waiver and random and unauthorized issues, and because the facts preclude section 1983 liability against these respondents. As discussed above, the respondents' arguments are unpersuasive. Since the liberty interest issue is consequential and *Young* directly affects the issue, this Court's actions should assure that the principles of *Young* are considered in this case.

As argued in the Petition, the random and unauthorized issue by itself is worthy of Court review. It raises the question of whether a hearing examiner's erroneous conclusion that an inmate is guilty of a violation is more like the loss of a hobby kit or the decision to admit a patient to a mental hospital. *See Parratt v. Taylor*, 451 U.S. 527 (1981) *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986); and

Zinermon v. Burch, 494 U.S. 113 (1990). The respondents do not discuss the merits of that question in their response brief.

Finally, for the reasons stated in the Petition, the waiver issue is appropriate for Court review. Indeed, it may also be appropriate for summary reversal. The novel waiver doctrine created by the Wisconsin Court of Appeals finds no support in federal law or in Wisconsin Supreme Court interpretations of federal law. The court of appeals' waiver doctrine directly conflicts with the principles of *Felder v. Casey*, 487 U.S. 131 (1988). Contrary to the respondents' argument in their brief, just a little common sense distinguishes this case from cases in which inmates do not participate at all in disciplinary hearings. Here, Santiago fully participated in the hearing and then appealed under institution appeal procedures. Regardless of whether the appeal raised every potential violation of his constitutional rights, he did not waive his right under 42 U.S.C. 1983 to seek redress in court.

CONCLUSION

The petitioner respectfully requests that the Court grant the petition for certiorari, summarily dispose of the petition on its merits, or remand the case to the Wisconsin Court of Appeals for reconsideration.

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